Supreme Court, U.S.
FILED

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No.

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

MARTIN ROSENTHAL,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

1. If federal officials charge a federal employee with an alleged federal crime, but allegedly deny him a fair hearing before and after punishing him for the alleged federal crime, and no other hearing is available to address the criminal punishment, may the federal employee pursue a judicial remedy, in order to obtain a hearing which will afford him procedural and substantive due process?

2. If federal officials seize the property of a federal employee, allegedly fabricate reports that it is a dangerous weapon, allegedly fabricate a scenario that the employee was acting dangerously and insubordinately at the time of the seizure, allegedly knowingly punish the employee for an alleged federal crime, without justification, and permanently bar the employee from ever possessing the property, may the employee sue these federal officials for damages under the Fourth Amendment and for declaratory judgment and injunctive relief?

3. If a federal employee calls upon federal law enforcement officers to come to his aid, in order to regain possession of his legal property after it has been seized by other federal officials, and in order to help stop other federal officials from allegedly portraying the seized property as a dangerous weapon and the employee as an allegedly dangerous person, and the federal law enforcement officers instead seize the property themselves and allegedly intentionally and falsely report it as an illegal, dangerous weapon, may the employee sue those law enforcement officers for violations of the Fifth Amendment of the U.S. Constitution?

4. If federal officials and federal law enforcement officers allegedly join together in order to commit the acts set forth in Questions 1, 2, and 3, above, and allegedly make use of interstate commerce to defraud the federal employee of his property and to obtain his wrongful punishment for an alleged federal crime, may the federal employee sue those officials for violations of the Racketeer Influenced and Corrupt Organizations Act and violations of state law?

5. Was the District Court obliged to rule on a motion to permit discovery and hold a hearing on the capacity of federal officials, in light of alleged definite evidence that the federal officials fabricated accounts of the existence of a dangerous weapon and fabricated accounts of dangerous behavior by a federal employee, in order to punish him for an alleged federal crime?

6. If attorneys of the U.S. Attorney's Office allegedly received false police reports about a federal employee, resulting in the wrongful punishment of the employee for an alleged federal crime, and the employee needs to call these attorneys as witnesses against the defendant police officers and other defendant federal officials who made the alleged false reports, should the District Court have granted the motion of the employee that the U.S. Attorney's Office be ordered to withdraw from representing the police officers and other federal officials?

7. If the District Court and the Circuit Court of Appeals assumed that the seizure of property, noted in Questions 1, 2, and 3, above, was necessary, because the federal officials reasonably believed it to be unlawful, did both courts assume the well-pleaded facts of the complaint are false, and thereby violate the applicable standard of review?

8. If the District Court and the Circuit Court of Appeals construed an undefined term in a criminal statute by applying a definition which is not the ordinary, common meaning of the word, did both courts violate the applicable standards of statutory construction and review?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The following list contains the names of all parties to the proceedings in the United States Court of Appeals for the Seventh Circuit: Martin Rosenthal, the United States, the Social Security Administration, the General Services Administration, Kenneth A. Apfel, David J. Barram, Charles R. Boyer, Stephen Jon Ahlgren, Bonny Barezky, Frank McGinley, Patricia Carey, Gustav Anderson, Raymond R. McKay, Paul Maxse, Daniel Kvachkoff, Cleophas Bradley, Jr., Eric Holderbaum, Rudy Negrete, Robert Howard, Pamela Goodemote, Gerard Lopatka, David Kaplan, and Judy Grant.

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The April 28, 1999 judgment and order of the Court of Appeals, whose judgment is herein sought to be reviewed, is contained in Case No. 98-3196 of the United Court of Appeals for the Seventh Circuit and was rendered on April 28, 1999. The order of the court is unpublished. The judgment and order are reprinted in the Appendix to this Petition, pp. 1-5.

The prior judgment of the United States District Court for the Northern District of Illinois was entered on July 1, 1998, and is contained in Case No. 97 C 1424 of the United States District Court for the Northern District of Illinois. This judgment and the memorandum opinion and order of the District Court are unpublished and are reprinted in the Appendix to this Petition, pp. 6-30.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

Citations for the following provisions in question are listed below. The pertinent text of these provisions is set forth at Appendix W to this Petition. The citations of these provisions are:

1. Fourth Amendment of the United States Constitution.
2. Fifth Amendment of the United States Constitution.
3. 18 U.S.C. § 930(g)(2).
4. Rules of Professional Conduct for the Northern District of Illinois, § 3.7(b) and Comment.

STATEMENT OF THE CASE

Basis of Federal Jurisdiction in Court of First Instance

This is, in part, a civil rights action, brought by Martin Rosenthal in the Federal District Court for the Northern District of Illinois, on March 3, 1997. The civil rights portion of the complaint, setting forth violations of the Fourth and Fifth Amendments, was brought pursuant to 28 U.S.C. § 1331 (federal question). The action also seeks an injunction and declaratory judgment, pursuant to 28 U.S.C. § 2201 et seq. (declaratory judgment). The action further seeks damages for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), pursuant to 18 U.S.C. § 1964(a), (c), and (d) (RICO), 28 U.S.C. § 1331 (federal question), and 28 U.S.C. § 1337 (commerce).

Background

Martin Rosenthal, the plaintiff, has worked as an attorney for the Chicago-South office of the Office of Hearings and Appeals ("OHA") of the Social Security Administration ("SSA"), since March of 1986. While employed at the Chicago-South office, Rosenthal has reported several administrative law judges for breaches of law and ethics, including alleged violations of the Hatch Act, abuse of disability claimants at hearings, and arbitrary denials of disability claims. Original Complaint ("OC"), 14.

Rosenthal also has a pocketknife. It is a Swiss Army "Super Tinker" pocketknife, manufactured by Victorinox. *Id.* 18. Rosenthal purchased this pocketknife at Radio Shack on June 20, 1994. App.39-42. The largest blade, the cutting edge, is two and five-sixteenth inches long, as shown from the photocopy of the blade with a ruler next to it. App.39. The distance from the tip to the handle of the "Super Tinker," including both the blade and the tang, the blunt portion of metal between the blade and the handle, is exactly two and eleven-sixteenth inches. *Id.* Other employees at the Chicago-South office, including a prior supervising attorney, Dennis Green, also carried Swiss Army pocketknives at work and used them. OC, Ex."N," 2. Rosenthal had carried this pocketknife, or one

smaller than it, on his keychain for the entire ten years that he had worked for the OHA. *Id.*

On about January 10, 1996, Rosenthal was speaking to another staff attorney, Gerard Lopatka, in Lopatka's office and Rosenthal assisted Lopatka by using his pocketknife to remove a jammed staple from Lopatka's stapler. TAVC, at attached Second Amended Complaint ("SAC"), 34.

The First Seizure

At about 4:45 P.M., on Tuesday, January 16, 1996, Rosenthal was typing on his computer in his office when Bonny Barezky, the Acting Hearing Office Chief Administrative Law Judge of the Chicago-South Office, came to his office. OC, 15. Barezky asked Rosenthal if he had a knife and he answered that he had a pocketknife. Barezky told Rosenthal to give his pocketknife to the office guard, Robert Howard. OC, 15. Rosenthal informed Barezky he would talk to his union steward and Barezky left.

Rosenthal spoke briefly with Douglas Gilmer, another staff attorney at the Chicago-South office. App. 51-53. Rosenthal also called his union steward, Norman Milsk, and typed two original receipts for his pocketknife. While waiting for these receipts to print on the printer, Barezky and Howard came to Rosenthal's office. Milsk then called Rosenthal back and asked to talk to Barezky on the telephone. Rosenthal told Barezky that his union steward wished to talk to her, but Barezky said she would not talk to anybody. App. 54-56.

At Milsk's suggestion, Rosenthal asked Barezky by what authority she was seizing his pocketknife. *Id.* Barezky replied by showing Rosenthal a copy of a General Services Administration ("GSA") flyer about prohibited weapons. After concluding his conversation with Milsk, Rosenthal told Barezky he would need a receipt for his pocketknife and he obtained the two original receipts from the office printer. Barezky said she would not sign anything, but Howard said he would. Rosenthal then gave his pocketknife and both original receipts to Howard who signed both and gave one signed copy to Rosenthal. App.50. The receipt reads: "Received or [sic] Martin Rosenthal one Swiss Army pocket knife on January 16, 1996."

Rosenthal, Barezky, and Howard then went to Barezky's office on the fifth floor, so that Barezky could copy the receipt which Howard had signed and so that Rosenthal could obtain a copy of the GSA flyer which Barezky had shown him.

While in Barezky's office, Barezky spoke with Patricia Carey, the Regional Management Officer, on the telephone. During this conversation, while on the telephone with Carey, Barezky asked Rosenthal whom he had been talking to on the telephone in his office while she was there. OC, 17. Rosenthal said he would not answer any questions without his union steward present. *Id.* Barezky also handed the receiver to Mr. Rosenthal, at which time Carey told Rosenthal that he was insubordinate. *Id.* Nobody mentioned the length of the blade of the pocketknife. After leaving Barezky's office, Rosenthal did not see any of the defendants again that day.

The Call For Help, The Second Seizure, And The Cover-up

On the morning of the next day, Wednesday, January 17, 1996, Rosenthal called the Federal Protective Service ("FPS"), in order to report the seizure of his pocketknife and get it back. OC, 19-20. Rosenthal reported the seizure to Daniel Kvachkoff, then the District Director of the FPS in Chicago. OC, 20. Rosenthal informed Kvachkoff that the pocketknife was an ordinary Swiss Army pocketknife, with a can opener, a bottle opener, and a blade. *Id.* Kvachkoff said he would have to look at the pocketknife himself and he dispatched Cleophas Bradley, Jr., a special agent of the FPS. *Id.*

Bradley came to Rosenthal's office that morning, said he would talk to Barezky, and said he would measure the blade of the pocketknife and tell Rosenthal if the pocketknife was legal. *Id.* Eric Holderbaum of the FPS also came with Bradley to Barezky's office and was present when Bradley said that Rosenthal's pocketknife was illegal. OC, Ex."L," 2.

Rosenthal called Bradley on the telephone, later in the afternoon of Wednesday, January 17, 1996. *Id.* Bradley told Rosenthal that the pocketknife was illegal and that it had a blade of almost two and three-quarter inches. *Id.* He also told Rosenthal that Rosenthal would not be getting the pocketknife back. *Id.* Bradley also said he had reported the seizure to the U.S. Attorney, but that

the U.S. Attorney was not going to prosecute, because it would not be in the interest of Rosenthal or the SSA. *Id.* 20-21.

Rosenthal tape-recorded his conversations with Bradley, in which Bradley repeatedly said the blade was "... a little less than two and three-quarter inches." App.57-62. In regard to what Bradley actually measured, he said: "It's the whole length of the blade, not just the sharp part of the blade. It's the entire length of the blade." App.59. It is clear that Bradley measured the distance between the tip of the blade and the handle, so that he included the tang, in addition to the blade, the cutting edge, in order to arrive at his measurement of "... a little less than two and three-quarters." App.57 and 59.

On Thursday, January 18, 1996, over the lunch hour, Rosenthal purchased a Swiss Army "Manager" pocketknife, in order to replace the "Super Tinker" which he would not be getting back. OC, Ex."N," 4. The receipt for this pocketknife which Rosenthal purchased at Otto Pomper, Inc., in Chicago, is also contained in the record. Plaintiff's Submission For Prove-Up of Damages. This pocketknife is even smaller than the "Super Tinker." OC, Ex."N," 4.

Rosenthal also purchased ties that had Swiss Army pocketknives on them. *Id.* On return to the office, Rosenthal showed the pocketknife and ties to Gilmer and Lopatka. OC, Ex."A," 1.

On the same day, Thursday, January 18, 1996, at about 5:20 P.M., Barezky and Gustav Anderson, the office manager, came to the office of Rosenthal. OC, 21. Barezky told Rosenthal that he was being placed on administrative leave and was not to return to the office, but was to call in each day. *Id.* at 21-22. Barezky also had Rosenthal clean out his desk and she and Anderson escorted Rosenthal to the lobby. *Id.* at 22. According to Barezky, both she and Anderson saw that Rosenthal was wearing "... yet another swiss army knife on his keychain." App.65. That statement is correct, because the pocketknife which Barezky and Howard seized is a Swiss Army pocketknife and the second one which Rosenthal purchased on January 18, 1996, is also.

On Monday, January 22, 1996, Rosenthal asked Kvachkoff to look at the pocketknife himself, but he refused to do so and also said he could not correct anything he could not see.

On January 22, 1996, Bradley identified the pocketknife as a "Swiss pocketknife" and said that Rosenthal would not get it back, without the approval of the U.S. Attorney, because it was illegal. App.60. Bradley told Rosenthal to call "GSA legal." App.62.

Following up on Bradley's suggestion, Rosenthal called Paul Maxse, the regional counsel for GSA in Chicago. OC 23. Rosenthal told Maxse that the pocketknife was an ordinary Swiss Army pocketknife and that there was no reason for the seizure. Maxse said he would check on this matter with the FPS and get back to Rosenthal. *Id.* Bradley later called Rosenthal on Monday, January 22, 1996, and said that Rosenthal could pick up his pocketknife from Rudy Negrete at the FPS office, because the U.S. Attorney was not going to prosecute. *Id.* Negrete is also a special agent of the FPS. *Id.*

At the FPS office, Neqrete brought the pocketknife to Rosenthal in a brown Manila envelope and asked Rosenthal if he could identify the pocketknife. *Id.* at 24. Rosenthal identified it and Negrete gave it to Rosenthal. Negrete also told Rosenthal that the pocketknife is illegal and that, for this reason, he had to escort Rosenthal to the outer door of the building. *Id.* Negrete then escorted Rosenthal out of the building. Later that day, Monday, January 22, 1996, at 5:30 P.M., Rosenthal finished cleaning out his office desk.

Rosenthal made his daily call to Barezky on Tuesday, January 30, 1996, as Barezky had instructed. *Id.* at 25. Barezky instructed him to return to the office and that he could not bring any knives or dangerous weapons with him. *Id.* When Rosenthal came to the office, Howard escorted him to Barezky's office, in plain view of the entire office. *Id.* Barezky asked Rosenthal if he had had any knives or dangerous weapons with him. *Id.* Rosenthal refused to answer without his union steward present. *Id.* Howard again escorted Rosenthal out of the office, again in full view of the office. *Id.*

When Rosenthal returned to the Chicago-South office, with his union steward, Milsk, Howard again escorted them, in full view of the entire office, to Barezky's office. App.55. Rosenthal then consulted with Milsk and answered that he had brought no knives or dangerous weapons with him. *Id.*

Barezky told Rosenthal and Milsk that these precautions were necessary, in regard to Rosenthal, because of what happened in

Oklahoma City. *Id.* She also told them that that she had personally measured a four inch blade. *Id.* Barezky also told Rosenthal and Milsk that several employees were concerned for their safety, because of Rosenthal and his pocketknife. App.55.

For these reasons, Barezky stated, an FPS guard would be posted on the twelfth floor where the office of the attorneys is located. OC at 26. Barezky then had Howard again escort Rosenthal, in plain view of the entire office, back to his office on the twelfth floor. *Id.*

Punishment For An Alleged Federal Crime

On February 23, 1996, Barezky gave Rosenthal a proposal to suspend him for 14 calendar days, on the grounds that he had possessed a dangerous weapon and was insubordinate. *Id.* The proposal also contained allegations that Rosenthal had possessed a prohibited weapon prior to the events of January 16, 1996, and that he had used it to commit several acts of assault or menacing against Barezky herself, starting in October, 1995. O.C. at 27.

The proposal and handwritten statements that Rosenthal obtained on November 4, 1996, contained reports by Barezky and Howard that they had measured the blade of Rosenthal's pocketknife. Barezky said she measured a blade of exactly three and three-quarter inches. App.64. Howard said he measured a blade of three and a half to three and three-quarter inches. App.66. Both purported to measure the cutting edge only.

Stephen Jon Ahlgren, the Regional Chief Administrative Law Judge, made the decision to suspend Rosenthal. OC 35. Ahlgren was also named as a witness before the Office of Special Counsel ("OSC"), in regard to the complaint which Rosenthal had filed with that agency, in which Barezky was the subject of the investigation. The topic of the investigation was Barezky's proposed suspension of Rosenthal. Ahlgren did give a statement to the OSC. App.80 and 81. Rosenthal had also named Ahlgren in the Notice of Claim which he had filed with SSA and GSA, so that Ahlgren could expect to be a defendant in a law suit. O.C., at Ex."V," 1. Rosenthal's union attorney, Kathleen Heiman, called upon Ahlgren to recuse himself from making the decision to suspend Rosenthal. *Id.*

Ahlgren was also a witness on behalf of Barezky, in regard to the complaint which Rosenthal filed against her with the Attorney Registration and Disciplinary Commission ("ARDC") of the Illinois Supreme Court. O.C. at Ex."W." As Ahlgren told the ARDC:

> I fully support Judge Barezky's decision .... I believe his [Rosenthal's] actions are totally retaliatory and without merit. Indeed, the filing of such a complaint with your Commission against a Judge merely doing her job is reflective of spurious and unprofessional conduct. *Id.* at 2.

Ahlgren also functioned as prosecutor in compiling the police reports from the FPS which were used to justify the suspension of Rosenthal. OC at 35. Finally, Ahlgren withheld the statements of the other defendants and did not disclose them until after Rosenthal had been punished. In spite of all the above, Ahlgren did not recuse himself and, on July 19, 1996, made his decision to suspend Rosenthal for 14 calendar days. OC at 35.

Ahlgren also referred Rosenthal to the Employee Assistance Program and recommended: "... follow any advice they may offer to you." O.C. at Ex."X," 8. Ahlgren also concluded that Rosenthal had been "less than truthful" and he stated: "... you have shown no remorse for your actions nor given any assurances that you would not repeat such behavior in the future." *Id.*

Ahlgren punished Rosenthal for committing a federal crime, based on the allegations of Barezky and Howard. Ahlgren also punished Rosenthal for insubordination, consisting of allegedly refusing to hand over his pocketknife and for allegedly refusing to tell Barezky who was on the telephone at the time she seized his pocketknife. As Ahlgren put it: "I do not find any reason why Judge Barezky and/or Officer Howard would make false statements regarding their measurements of the knife blade, nor do I believe they did so." OC at Ex. "X," 4. Ahlgren also concluded that Rosenthal's allegation about having the "Super Tinker" was "self serving." *Id.*

Rosenthal served a 14 day suspension without pay, during the pay period ending August 17, 1996, as shown by his earnings statement. O.C. at Ex."Y."

Charles R. Boyer, the U.S. Chief Administrative Law Judge of SSA, reviewed Ahlgren's decision. Rosenthal requested a full due

process hearing before Boyer made his decision. OC at 44. However, Boyer never replied and then upheld the discipline of Rosenthal and decided the Swiss Army "Super Tinker" pocketknife is a dangerous weapon, in accordance with a technical, trade definition used in the cutlery industry. *Id.* Plaintiff's Brief On Motion For Discovery And Evidentiary Hearing On Issue Of Official Capacity ("MFD"), Ex."X," at 3.

Boyer also decided that Rosenthal may not possess the "Super Tinker" pocketknife. *Id.* at 7. As Boyer put it: "You have now been educated ..." *Id.* at 7. Because the chain of custody was broken when the FPS returned the pocketknife to Rosenthal, Boyer stated Rosenthal was "exonerated" from the charge of possessing a dangerous weapon. *Id.* However, Boyer stated that Barezky and Howard measured the blade lengths which they reported. *Id.* at 3.

The Aftermath

On November 4, 1996, after serving his suspension without pay, Rosenthal obtained from his union attorney copies of fabricated statements which several defendants had written during January and February of 1996. TAVC, at attached Second Amended Complaint ("SAC") at 24-38. These statements were communicated to third parties via faxes, by long distance telephone, and by the U.S. mail. O.C. at Ex."M," 22 and 38.

Barezky stated that Rosenthal had menaced her on several occasions with a large, illegal pocketknife and that he is "... a danger to the safety of the employees." App.63-65. Concerning one alleged encounter with Rosenthal, during which he was supposed to have assaulted or menaced Barezky with a pocketknife, Barezky stated: "I was again frightened to death. My heart began to race." App.64. This statement and all other statements relating to such acts are entirely false and fabricated. Barezky even stated she told Rosenthal not to use his pocketknife during their private conversations. MFD at Ex."N," p.6. However, Rosenthal tape-recorded his only two private meetings with Barezky and there was no mention of any pocketknife. MFD at Ex."T."

Pamela Goodemote, the supervising attorney at the time of the seizure, stated that Rosenthal had menaced her with a four-inch blade in August, 1990, and that he had done this repeatedly to another

administrative law judge, Patricia Kelly. TAVC, at attached SAC, 29 and 30. Goodemote also stated that if Rosenthal came back to the Chicago-South office, it would be for her "... tantamount to a death sentence." *Id.* at 32. Goodemote also said that Rosenthal had stalked her at Union Station in Chicago. *Id.* at 31. She also said Rosenthal was a threat to harm her daughter. *Id.* 32. All these statements are entirely false and fabricated.

Lopatka said that Rosenthal had taken from his pocket a "... very large red hunting knife..." and that he was also afraid of a larger fixed blade knife which was "... even more threatening." *Id.* at 34. These statements are false and fabricated.

David Kaplan, another staff attorney, stated he had also seen Rosenthal's pocketknife and that it was "... only a matter of time before he slashes or kills one of us." *Id.* 36. Kaplan also said that if Rosenthal came back to the office, Kaplan would be "... quaking in fear ..." *Id.* Kaplan stated: "Why do we have to leave for work every day not knowing if we will return in a body bag?" *Id.* These statements are entirely false and fabricated.

Judy Grant, another staff attorney, stated: "Since I have become one of his prime targets, I am terrified about what he might do .... I do not believe I can continue to work under these conditions." *Id.* 38. These statements are also entirely false and fabricated.

While this case was pending in the District Court, Donna Van Polen, one of the staff attorneys in the Chicago-South office asked Barezky about reports that Rosenthal was dangerous. App.68-70. In her affidavit, Van Polen reported that Barezky said that she herself was not the least bit afraid of Rosenthal and never thought that he was dangerous. *Id.*

After this case had been dismissed by the District Court, Lopatka told Van Polen that Mr. Rosenthal was a "nice guy" and that he did not think that Rosenthal was dangerous. App.71-73. However, Lopatka said that Barezky had called several of the attorneys to a meeting, told them to write statements, and told them to use "buzz words" about Rosenthal. *Id.* He also said that when the head of the office requests such a statement, it is necessary to give it. *Id.*

The seizure of Rosenthal's pocketknife was supposed to be investigated by Raymond McKay, a facilitator for SSA. OC at 30.

However, McKay never spoke with Rosenthal and, as far as can be determined, McKay made no effort to examine the pocketknife or to have it examined. *Id.* There is no indication that McKay ever generated any investigative report or investigative file. OC, at Ex."N," Statement by Attorney Kathleen Heiman.

Upon information and belief, it was Frank McGinley, then the Regional Personnel Officer, who drafted the statements which Barezky read to Rosenthal and Milsk throughout the above events, although there is no indication that McGinley attempted to investigate the nature of the pocketknife or anything else. OC at 36.

A letter from Bryan Sewell, the buyer for Radio Shack, confirms that the Swiss Army "Super Tinker" pocketknife is sold by Radio Shack. App.44. The Radio Shack package in which the "Super Tinker" came also states that the "Super Tinker" is a "Radio Shack Exclusive." App.41.

The record also contains a letter from Dan Bilger, a cutlery dealer in Chicago, to Ahlgren, noting that there is no Victorinox Swiss Army knife available in the United States with a cutting edge longer than three and one-sixteenth inches. App.45.

James Kennedy, the former Chairman and Chief Executive Officer of The Forschner Group which distributes Victorinox Swiss Army knives has also written an affidavit, stating that the blade of the "Super Tinker" is two and three-eighth inches long, within the limit set by the dangerous weapon statute, 18 U.S.C. § 930(g)(2). App.43.

An expert in knives, Charles W. Karwan, also wrote an affidavit, stating there is no red-handled Swiss Army pocketknife with a cutting edge longer than three and one-sixteenth inches. App.46.

Karwan also stated that the term "animate" does not appear in any cutlery references. *Id.* However, Karwan also stated that, in his expert opinion, the term "animate," in reference to a folding knife, would refer to the entire part of the knife which moves outside the handle, meaning both the cutting edge, the true blade, and the tang, the blunt part between the cutting edge and the handle. App.46 and 47. He also stated this would be two and eleven-sixteenth inches for the "Super Tinker." *Id.* This corresponds to the "a little less than two and three-quarters" which Bradley said he measured as the "actual animate part of the blade." *Supra*, at 5.

As discussed above, the defendants identified Rosenthal's pocketknife as a Swiss Army pocketknife on several occasions. No defendant ever identified another manufacturer of the pocketknife which Barezky, Howard, and Bradley purported to handle, open, and measure. None of these people ever produced the pocketknife or any photocopy of the alleged offending blade.

Although Barezky never mentioned Rosenthal's pocketknife in any private meetings, she and Rosenthal did discuss serious problems with the decisions of one particular administrative law judge -- Edward R. Gustafson. On January 10, 1996, Barezky told Rosenthal it was not in his job description to question the competence or ethics of administrative law judges. MFD, at Ex."T," p.20.

Record of Punishment For A Federal Crime And Permanent Prohibitions

The punishment of Rosenthal for a federal crime, having a dangerous weapon, is now history and part of the permanent SSA record for Rosenthal. It is contained in the "Notification of Personnel Action" which SSA created, showing "POSSESSION OF A PROHIBITED WEAPON ON FEDERAL PREMISES" and "INSUBORDINATE CONDUCT." App.79. This record of punishment is based entirely on the fabricated accounts noted above, including fictitious blade lengths and accounts of dangerous and insubordinate conduct. As also noted above, Rosenthal is now permanently prohibited from possessing the "Super Tinker" pocketknife -- a legal pocketknife under 18 U.S.C. § 930(g)(2).

Although Rosenthal filed the complaint with the OSC, as noted above, the record contains no evidence that the OSC provided Rosenthal with any relief, because, in fact, that agency never did.

The Decisions of the District Court

Rosenthal filed a Third Amended Verified Complaint ("TAVC") in Federal District Court which consists of thirteen counts. Counts one, two, and three set forth violations of the Fourth and Fifth Amendments of the U.S. Constitution, because of the seizures described above.

The complaint alleges that the Barezky and Howard seized Rosenthal's personal property, a Swiss Army "Super Tinker" pocketknife, which the defendants knew to be legal; and that the FPS officers noted above committed another wrongful and intentional seizure of the plaintiff's pocketknife after Rosenthal called them for help. Their conduct included knowingly and intentionally giving false police reports and covering up for other officers who did so.

The complaint also alleges that the FPS officers noted above violated Rosenthal's Fifth Amendment rights, because they knowingly and wrongfully reported to government agencies that Rosenthal's pocketknife was a dangerous weapon, in violation of the federal criminal code. Further, the complaint states that the defendants punished Rosenthal for a federal crime, possession of dangerous weapon, under a statute, 18 U.S.C. § 930(g)(2), which is vague and overbroad. TAVC, at attached Second Amended Complaint ("SAC") at 17-21.

Counts four through twelve are actions to recover for intentional and negligent infliction of mental distress, conversion, libel, and slander, relating to the events noted in the above paragraphs. TAVC, at attached SAC at 22-38.

The thirteenth count states a claim under the Racketeer Influenced and Corrupt Organization Act ("RICO"). TAVC at 9-12, and attached SAC at 39-42. As set forth in that count, the defendants conducted or participated in a racketeering enterprise, through which they used the U.S. mail, faxes, and long distance telephone conversations, in order to disseminate false police reports and other false and fraudulent information to and about Rosenthal.

The Office of the U.S. Attorney filed a certification that the defendants acted in their official capacity, in order to substitute the United States for the defendants, on state tort counts. App.82-84.

Rosenthal filed a Motion For Discovery And An Evidentiary Hearing On The Issue Of Official Capacity. MFD. On January 14, 1998, the District Court ordered that the United States submit affidavits or other documents, showing that the defendants acted in their official capacity, and addressing all the factual issues raised in the plaintiff's motion for discovery. App.35-38. The District Court stated in its order of dismissal that it denied Rosenthal's motion on official capacity on January 14, 1998. App.23. However, this motion

was not denied on that date and, in fact, was never ruled on by the District Court.

The plaintiff moved to disqualify the Office of U.S. Attorney from representation of the defendants, because Assistant U.S. Attorney Fullerton received the report from Bradley, concerning the pocketknife, and the head of the Chief of the Criminal Division, Gary Shapiro, stated that no matter was pending in the Office of the U.S. Attorney concerning Rosenthal's pocketknife and that the U.S. Attorney had taken no position on any discipline of Rosenthal. App.74-78. The District Court orally denied this motion on February 11, 1998. Plaintiff's Principal Brief ("PPB"), at App.42 and 43.

On May 29, 1998, the District Court entered a Memorandum and Order which dismissed the complaint as to all defendants, except Howard. App.6-30. The District Court decided that all of Rosenthal's claims are barred by the Civil Service Reform Act. App.13. The court also decided that the defendants have qualified immunity, that the criminal statute involved is not vague, and that the defendants could not be sued, because of sovereign immunity. App.19-25. The District Court further stated that Rosenthal had failed to set forth a RICO claim, because he had failed to show how the defendants constituted a racketeering enterprise and failed to show how the conduct of the defendants constituted mail or wire fraud. App.27.

On June 29, 1998, the District Court vacated its order of default judgment against Howard and dismissed the complaint against Howard who never answered the complaint after being personally served. App.31-34.

The Decision of the Court of Appeals

The judgment of the Court of Appeals, entered on April 28, 1999, was to affirm the dismissal of the District Court. App.1-5. In an unpublished order, the court held that all of Rosenthal's claims attack a personnel action, so that Rosenthal has the right to bring his dispute before the Merit System Protection Board. Therefore, the court reasoned, Rosenthal cannot complain of alleged procedural deficiencies, so that the District Court lacked jurisdiction over Rosenthal's claims. App.5.

REASONS FOR GRANTING THE WRIT

I. The Circuit Court Of Appeals Sanctioned A Departure Of The District Court From The Accepted And Usual Course Of Judicial Proceedings, So That It Is Necessary For The Supreme Court To Exercise Its Supervisory Power.

A. The District Court Never Ruled On Rosenthal's Motion For Discovery And An Evidentiary Hearing On The Issue Of The Capacity Of The Defendants; The Court Of Appeals Never Addressed This Failure.

The government certified that the defendants acted within the scope of their employment. App.37. Rosenthal filed a motion for discovery and an evidentiary hearing on the issue of capacity in which the defendants were acting. ("MFD"). Among the documents attached to that motion were sections C through Q of the Appendix to this petition. The District Court, in response, ordered the government to submit an affidavit or declaration which "... should be directed at all of the factual issues raised plaintiff's motion for discovery." App.38.

Thomas P. Walsh of the Office of the U.S. Attorney certified that the defendants acted within scope of their employment. He said he assumed that the facts stated in the complaint are true and stated that the actions of the defendants took place during working hours and that all their actions " ... are of the type that employees are reasonably expected to engage in." App.83. However, the complaint alleges that the defendants knowingly seized a legal item of personal property, fabricated accounts that it was illegal, falsely reported Rosenthal for criminal conduct to the U.S. Attorney and other government agencies, and knowingly and wrongfully punished Rosenthal for a federal crime.

This conduct of the defendants was criminal, tortious, and egregious and completely outside the scope of the employment of the defendants. Such conduct serves no purpose of the United States, their employer. Under Illinois law, this conduct, therefore, supplies no official capacity, governmental immunity. *Snodgrass v. Jones*, 957 F.2d 482, 485 (7th Cir. 1992). The defendants acted in an

individual capacity, completely outside the scope of any statutory authority, so that the United States should not have been substituted for them. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-688 (1949).

The contradictory statements of Bradley, Barezky, and Howard, concerning the length of the blade of Rosenthal's pocketknife, establish that they fabricated their accounts of a dangerous weapon. Appendix Sections N, O, and P. Barezky wrote at least two dozen handwritten pages, alleging three occasions on which Rosenthal was supposed to have threatened and assaulted her with a large, illegal pocketknife which she said she personally measured. Appendix O. As Barezky put it: "I again was frightened to death." App.64. Barezky even compared Rosenthal to the Oklahoma City bomber. App.55. Yet, after Rosenthal filed this law suit, Barezky told Van Polen, another staff attorney, that Rosenthal was a "role model employee," that she was never afraid of him, and that she never felt he was dangerous. App.68 and 69. Such conduct establishes that the defendants knew what they did was wrong, so they have no right to claim absolute, governmental immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985).

The motion for discovery and an evidentiary hearing on capacity also contained statements and affidavits from experts in cutlery, establishing that the Swiss Army pocketknife, described in detail by Barezky, Bradley, and Howard, does not exist. Appendix Sections G, I, and J. Howard signed a receipt for "one Swiss Army pocket knife." App.50.

Bradley made clear he had seized a "Swiss pocketknife." App.61. Barezky stated that both pocketknives which she and Anderson, the office manager, observed were "swiss army" knives. App.65. This further established the intentionally tortious, egregious conduct of the defendants, so that they were entitled to no scope-of-employment immunity at all. *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993).

As noted above, the District Court stated in its order of dismissal that it denied Rosenthal's motion on official capacity on January 14, 1998. App.23. However, this motion was not denied on that date and, in fact, was never ruled on by the lower court. Therefore, the lower court's decision makes it appear that the court considered and ruled on a motion which it never actually ruled on at

all. This was a critical motion. The detailed evidence contained with it establish that the defendants were not entitled to any claim of official capacity, scope-of-employment, or governmental immunity. They had no right to claim sovereign immunity, because their acts were both criminal and intentionally tortious. Such conduct, like perjury, focuses upon and offends the "honor of the sovereign." *Mooney v. Holohan*, 294 U.S. 103 (1935). The failure to even rule on the motion, let alone grant it, made it impossible for Rosenthal to obtain the required evidentiary hearing at which the defendants would have had to make their statements under oath and cross examination.

The failure of the District Court to rule on the motion for discovery and an evidentiary hearing also had a major impact on the District Court's decision that Rosenthal's case was preempted by the Civil Service Reform Act. The Supreme Court has made clear that such preemption applies only when governmental employees are engaged in "official acts," in which case they should not be subject to personal liability. *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988). The evidence which was a part of the motion for discovery and an evidentiary hearing on the issue of capacity was definite and not speculative in any way. That evidence establishes that the defendants never engaged in any "official acts." They acted for their benefit alone and all that they did was both criminal and tortious, in violation of the Constitution, RICO, and Illinois common law.

The Supreme Court has also made clear that a warrantless search and an uncompensated taking are completely outside the Civil Service System and are not even "personnel actions within the statutory scheme." *Bush v. Lucas*, 462 U.S. 367, 385 n.28 (1983). A hearing on official capacity would have further established that the defendants performed an unreasonable and warrantless search and seizure of Rosenthal's pocketknife, in violation of the Fourth Amendment.

Such a hearing would have established not only that they have no scope-of-employment or governmental immunity, but that they acted totally outside the "statutory scheme," so that this is not a civil service matter at all. In addition, the Bradley tapes show that Bradley repeatedly told Rosenthal he would never get his pocketknife back and that it was seized as illegal contraband. App.57, 58, 60, and 61. That is why Rosenthal purchased a new pocketknife the next day. *Supra*, at 6.

A hearing would have further established that this was a wholly unreasonable and uncompensated taking. Such a significant taking by government is not *de minimis* and is within the purview of the Due Process clauses of both the Fifth and Fourteenth Amendments. The gravity of such a seizure is irrelevant to the question of whether account must be taken of the Due Process Clause. *Ingraham v. Wright*, 430 U.S. 651 (1977); and *Goss v. Lopez*, 419 U.S. 565 (1975). This uncompensated taking also constituted conversion, in violation of the common law of Illinois, as also set forth in the complaint.

The Fourth Amendment violations and common law conversion, as set forth in the complaint, and the entire record of the case in the District Court establish both a warrantless search and seizure and an uncompensated taking. There has never been any assertion by the government that there was ever a warrant or any compensation paid to Rosenthal for the seizure for of his pocketknife. A hearing on the issue of the capacity of the defendants would have confirmed what definite evidence already showed -- that the defendants acted completely outside the statutory scheme, so that there never was any "personnel action" at all.

Rosenthal sued the defendants in their individual capacities. Because this action was against federal officers, the District Court had the obligation to at least examine the facts of the case and the entire record, in order to determine whether there was a suit against the individual defendants, in addition to the federal government. *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371 (1945); and *Blaney v. United States*, 34 F.3d 509 (7th Cir. 1994).

Rosenthal raised this issue and discussed it fully as reversible error in briefs filed with the Court of Appeals. ("PPB"), at 6, 50, 51, 56, and 57; and Plaintiff's Reply Brief ("PRB"), at 16 and 17). The Circuit Court noted the scope-of-employment certification by the U.S. Attorney, but made no mention of the motion on the issue of official capacity and no mention of the fact that the District Court had failed to rule on the motion. App.4.

This is reversible error which requires that the Supreme Court exercise its supervisory power by reversing the decision of the Court of Appeals. A large number of civil rights litigants may well be affected by the failure of federal courts to rule on such a critical motion. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469

(1992). This is particularly evident in a case where the court says it did rule on the motion and denied it, but the court never ruled at all. Uninformed parties and litigants may not even know that this occurred. Such a failure, therefore, presents an important issue. *Burson v. Freeman*, 504 U.S. 191, 194 (1992).

B. Both The District Court And Court Of Appeals Failed To Apply The Required Standards Of Review.

As noted by the District Court, on a motion for dismissal the court must presume all of the well-pleaded allegations of the complaint to be true. *Miree v. DeKalb County*, 433 U.S. 25, 27 n.2, (1977). In addition, the court must view those allegations in the light most favorable to the plaintiff. *Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1039 (7th Cir. 1987). Dismissal is proper only if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). App.12.

In spite of the well settled rules of review of the facts, noted above, the lower court assumed that several of the well pleaded facts were not true, including the intentionally false reporting of the nature of Rosenthal's pocketknife and intentionally false reports of his conduct at and prior to the time it was seized. Rosenthal pleaded that the seizure carried out by the defendants was not objectively reasonable, because the defendants knew for a fact that his pocketknife was legal, that they conspired with each other to cover up this fact, and that they falsified this fact to the Office of the U.S. Attorney. R.65, TAVC, at attached SAC 17.

These are the well pleaded facts which the lower court should have taken to be true. However, the lower court took these facts to be false and concluded instead: "Taking possession of plaintiff's pocket knife was necessary since it was reasonably suspected to be unlawful." App.16. This conclusion violates the standard of review which the lower court stated it is bound to follow and is in conflict with the Supreme Court decisions of *Miree* and *Conley*. *Supra*.

Considering the additional well pleaded facts in the complaint, it is virtually impossible for the seizure by the defendants to have been reasonable. No two defendants who claimed to have actually measured the blade of Rosenthal's pocketknife reported the same

blade length. Barezky told Rosenthal and his union steward that the blade was four inches long. App.55. She later said she measured the cutting edge as three and three-quarter inches. App.64. Howard said the cutting edge was three and a half to three and three-quarter inches. App.66. Both of them claimed to measure what they defined as the blade -- the cutting edge only.

Bradley said repeatedly that the blade was "... a little less than two and three-quarters." Bradley also said he was measuring the "... full length of the, uh, actual animate part of the blade." "It's the whole length of the blade, not just the sharp part of the blade." App.57-59. It is clear from this description that Bradley was indeed referring to the Swiss Army "Super Tinker" pocketknife. The only problem is that he was not measuring the blade at all. He measured the distance between the tip and the handle, including the tang. Karwan's affidavit makes clear the deception that Bradley practiced. App.46-49.

Based on these wildly differing measurements of the blade and the differing definitions on what a blade is, it is clear that the defendants concocted their stories, in order justify their seizure of Rosenthal's pocketknife and in order to permanently tar him with punishment for a federal crime. Yet, the District Court gave these stories full credence and used them to justify their seizure of Rosenthal's property and their punishment of Rosenthal for a federal crime. This acceptance of the opposite of the well pleaded facts, in regard to what the defendants "reasonably suspected," achieved the opposite of the result which the Supreme Court mandated in *Miree* and *Conley*. *Supra*. As discussed above, this not only violated the terms of the complaint, but was impossible, in light of the obvious fabrications of the defendants. This was the first violation of the applicable standard of review, as set forth in *Miree* and *Conley*. *Supra*.

The Circuit Court of Appeals sanctioned this departure from the accepted standard of review. The Circuit Court agreed with the analysis of the District Court and concluded: "Bringing a federal weapon onto a federal facility is both a federal crime and a violation of the terms of employment of one who works on a federal facility." App.5. In regard to Rosenthal, the Circuit Court stated: "Had Barezky seized the knife and referred the matter to the U.S. Attorney's Office, the seizure would be the first step in a criminal

prosecution." App.5. Under this view, Rosenthal had indeed committed a federal crime.

Second, in addition to reversing the applicable standard of review, concerning the conduct of the defendants, the Court of Appeals, like the District Court, ignored the language of the "dangerous weapon" statute. A dangerous weapon is defined in 18 U.S.C. § 930(g)(2) as a "... weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of causing death or serious bodily injury ...." App.85. However, it also states that this does not include a pocketknife with "a blade of less than 2½ inches." *Id.*

The criminal statute does not define the term "blade." Therefore is necessary to give the term its ordinary meaning or acceptation. *United States v. P. Koenig Coal*, 270 U.S. 512 (1926). The District Court accepted the plaintiff's definition of blade: "the flat-edged cutting part of a cutting tool or weapon." The American Heritage Dictionary of the English Language (Dell Publishing Co., Inc., 1970, p.75). App.21 and 85. The flat-edged cutting part of the Swiss Army "Super Tinker" is 2 5/16 inches long, as the photocopy shows. App.39. The blade is simply the cutting edge. This is the universal ordinary, common acceptation of the word.

It is based on this ordinary definition of "blade" that Victorinox manufactures Swiss Army pocketknives and The Forschner Group distributes them in the United States. James Kennedy, the past chairman and chief executive officer of The Forschner Group stated in his affidavit that the blade of the "Super Tinker," measured in eighths of an inch, is two and three-eighths inches long. App.43. The affidavit of Charles Karwan, an expert in knives, also states that the cutting edge of the "Super Tinker," the true blade, is two and five-sixteenth inches long. App.46-49.

Even though the District Court stated that it accepted the dictionary definition set forth above, it went on to find that the "Super Tinker" blade is longer. In order to do so, the court added on the tang, the blunt part of metal between the cutting edge and the handle. App.21. As the lower court put it: "The definition of a blade does not exclude the part nearest the handle of a knife." *Id.* However, the tang is not part of the blade for two reasons. First the tang is not "flat-edged." It is blunt. Second, the tang does not belong to the "cutting part," because it will not cut anything. Karwan, in his

affidavit, discusses the difference between the true blade, the cutting edge, and what is known in the cutlery industry as the "master blade" -- the combination of the tang and cutting edge together. App.46 and 47.

It is this misunderstanding about the definition of the "blade" which Bradley took advantage of when he told Rosenthal that he was measuring the "... whole length of the blade, not just the sharp part of the blade." App.59. Both the District Court and the Court of Appeals chose to accept this definition and to ignore the ordinary, "common acceptation" of the word "blade." This was a clear violation of the standard for construction of a criminal statute laid down by the Supreme Court in *Koenig Coal*. *Supra*, at 21. These are obvious violations of the applicable standards of review, in regard to viewing the well pleaded facts of a complaint, and in construing the undefined terms of a criminal statute. Such obvious and alarming, direct conflicts with the precedents of the Supreme Court strongly favor the Court's granting of this petition for a writ of certiorari. *Lambert v. Wicklund*, 520 U.S. 292 (1997).

C. Both The District Court And Circuit Court Of Appeals Failed To Apply The Required Standard Of Review, In Regard To Conflict of Interest, Which Requires Ordering The Office Of The U.S. Attorney To Withdraw From Representing The Defendants.

As discussed above, Bradley called Assistant U.S. Attorney Stuart Fullerton, in order to make his police report. App.74-77. He stated he told the Assistant U.S. Attorney Fullerton that Rosenthal's pocketknife is illegal. App.58. Bradley said the U.S. Attorney chose not to prosecute and that the U.S. Attorney "... did not want to push the issue." *Id.* Bradley also stated that the U.S. Attorney had been advised of the case and that the pocketknife would not be returned to Rosenthal without the approval of the U.S. Attorney. App.60.

Because the Swiss Army "Super Tinker" pocketknife is legal under the criminal statute at issue, Bradley made a false police report. This was police misconduct, in violation of the Fifth Amendment, as set forth in the second cause of action in the complaint. It was also use of interstate commerce, in violation of RICO, as set forth in the thirteenth cause of action. Fullerton is an essential witness to that

report. Only he received it. Whatever blade length Bradley reported to Fullerton, such a measurement will inevitably conflict with the measurements reported by Barezky and Howard, and possibly by Bradley himself.

The letter from the chief of the criminal division of the U.S. Attorney's Office, Gary Shapiro, establishes that the Office of the U.S. Attorney was not considering criminal prosecution and that the U.S. Attorney had had taken no position on possible discipline of Rosenthal. App.78. Shapiro did not say why this was.

The District Court applied the Rules of Professional Conduct for the Northern District of Illinois, § 3.7(b). PPB, at Appendix 38 and 39. This rule and the comment to it are also included in the Appendix to this Petition. App.86. The District Court recognized that the testimony of Fullerton would have to be prejudicial to the other defendants, before the Office of the U.S. Attorney would have to withdraw from representing the defendants. PPB, at App.39. The District Court denied the motion that the U.S. Attorney be ordered to withdraw, because it would not be prejudicial for Fullerton and Shapiro to testify "... that the decision was made to decline prosecution." *Id.*, at 43.

The problem with the Court's analysis is that the record establishes that the testimony of Fullerton cannot be other than prejudicial to the other defendants. As noted above, Fullerton's testimony will, without doubt, contradict their testimony. The District Court looked only at the possibility that Fullerton and Shapiro would testify only that there was a decision to decline prosecution. They may also state that the reason for this decision was that the U.S. Attorney's office knew the pocketknife was legal.

When Fullerton testifies about what Bradley reported to him, such testimony will surely be prejudicial. The length of the blade which Bradley reported measuring will contradict all or some of the other measurements by the defendants and may even contradict Bradley's subsequent measurement which he gave to Rosenthal. This is the conflict which makes it ethically impossible for the U.S. Attorney to represent any of the defendants. The supervisory power of the Supreme Court is also needed, in order to address this problem, so that necessary witnesses are available to testify in this case and other cases in the future, without the presence of any conflict of interest.

II. The Court of Appeals Decided Important Federal Questions In Ways That Conflict With Relevant Decisions Of The Supreme Court.

A. Both The District Court And Court Of Appeals Failed To Recognize The Right To A Hearing Before Punishment For A Federal Crime.

When the defendants charged Rosenthal with a federal crime, possession of a dangerous weapon, in violation of 18 U.S.C. § 930(g)(2), and related, alleged acts of insubordination related to the seizure of Rosenthal's property, his union attorney requested an oral reply before Ahlgren. As discussed above, there were conflicts of interest which Ahlgren had that prevented him from having the legal capacity to make the decision in Rosenthal's case. *Supra*, at 7 and 8. However, Ahlgren failed to recuse himself and later did punish Rosenthal for the federal crime charged.

By refusing to recuse himself, Ahlgren comported himself in a way that showed he was biased. He was a witness before at least two agencies -- the OSC and the ARDC. He was a party under the Notice of Claim filed with SSA and GSA. He also functioned as prosecutor in gathering evidence to be used against Rosenthal. All of these activities which Ahlgren engaged in, information which he had access to as a witness, and sources of information which he gathered as prosecutor were all extrajudicial in nature. They were also outside his scope of judicial activity in deciding if Rosenthal had committed a federal crime. Therefore, under the extrajudicial source doctrine, Ahlgren did not have the legal capacity to decide Rosenthal's case. *Liteky v. United States*, 510 U.S. 540 (1994). He needed to recuse himself, in order to avoid, at the very least, the "appearance of impartiality." *United States v. Tucker*, 78 F.3d 1313, 1325 (8th Cir. 1996), *cert. denied*, 519 U.S. 820 (1996).

Punishment for a federal crime, possession of a dangerous weapon, punishment for alleged insubordination, in refusing to hand over the dangerous weapon, and allegedly refusing to say who was on the telephone, while the seizure of the supposed dangerous weapon was in progress, all involve "dishonesty or immorality." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573

(1972). *Prior* to destroying Rosenthal's "good name, reputation, honor, or integrity," the defendants were obliged to provide him with "notice and an opportunity to be heard." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

Rosenthal was entitled to "some kind of prior hearing." *Roth*, at 570. Such a hearing had to comport with fundamental fairness. *See Roth* and *Constantineau*, *supra*. However, in this case, the oral union presentation before Ahlgren did not qualify as such a hearing. Ahlgren had the conflicts of interest discussed above. Any one of these conflicts required that he recuse himself which he failed to do. He failed to disclose the written statements of the other defendants until after punishment of Rosenthal and Ahlgren relied totally on the blade measurement statements of Barezky and Howard, without even attempting to produce the "dangerous weapon." The defendants have never alleged that the presentation before Ahlgren was a valid due process hearing.

Because of his punishment for a federal crime, Rosenthal will, for the rest of his life, have to declare his criminal record to every state and federal court, when he applies to practice law before that court. Boyer has also permanently barred Rosenthal from future possession of the Swiss Army "Super Tinker" pocketknife. Rosenthal will have to declare his criminal record on every job application and in any application for a security clearance. Is a carrier of dangerous weapons, who refuses to hand over the weapon at the time of seizure, who refuses to disclose who was on the telephone at the time of seizure, and who must be permanently barred from possession of the "dangerous weapon" a fit person to practice law, a fit person to employ in a law firm, or a fit person to entrust with the security of the United States? The question answers itself. This is the lifetime stigma which the defendants have guaranteed to Rosenthal. The defendants intentionally and systematically caused this permanent deprivation of liberty, in violation of the Due Process Clause of the Fifth Amendment.

In addition to the deprivation of liberty, as set forth above, the defendants also deprived Rosenthal of property, in violation of the Due Process Clause of the Fifth Amendment. After almost ten years on the job, he lost two weeks of salary as punishment for his "federal crime." He also had to buy a new pocketknife, because Bradley told him the government had permanently seized the "Super Tinker."

Rosenthal had a "legitimate claim of entitlement" to both his pocketknife and his salary. *Roth*, at 2709. This was not a case of an abstract need or desire for property. Barezky, Howard, Bradley, and all the other defendants combined to deprive Rosenthal of this property, through their above scheme which was intentional and which demonstrated reckless disregard of Rosenthal's Constitutional rights. This is conduct which shocks the conscience. The loss of the right to have a Swiss Army "Super Tinker" pocketknife, a legal item of personal property, is a permanent legal disability which is a loss of protected liberty. *Constantineau*, *supra*, at 25.

Rosenthal raised all of the above due process violations before the District Court and the Circuit Court. Neither the District Court, nor the Circuit Court, addressed the nature of criminal punishment and the lack of any valid due process hearing prior to punishment.

B. Both The District Court And Court Of Appeals Assumed Rosenthal Has Only An Administrative Remedy When None Exists And When The Only Remedy Is A Judicial One.

In addition to ignoring Rosenthal's right to a hearing before punishment for a federal crime, as discussed above, both the District Court and Court of Appeals based their decisions on the supposed right to a hearing after punishment. The Circuit Court stated that Rosenthal had only a personnel dispute and that the courts have "... no jurisdiction over federal civil service personnel disputes." App.5. Based on prior decisions of the Supreme Court, as well as prior Circuit Court decisions, the opposite is the case, as discussed below.

As noted above, the Supreme Court noted in *Bush* that a warrantless search and an uncompensated taking are not even "personnel actions within the statutory scheme" of the Civil Service Reform Act ("CSRA"). *Bush*, *supra*, at 17. A warrantless seizure of personal property, in violation of the Fourth Amendment, and common law conversion are both, by their very nature, a warrantless search and an uncompensated taking. A search occurs whenever an expectation of privacy that society is prepared to consider reasonable is infringed. *United States v. Jacobsen*, 466 U.S. 109 (1984). A seizure occurs whenever there is some meaningful interference with an individual's possessory interest in that property. *Jacobsen*, *supra*.

Rosenthal had a legal item of personal property, an ordinary pocketknife, on his keychain. Barezky told him to give it to Howard. Rosenthal took it off his keychain and complied. Bradley then seized the pocketknife the next day. Barezky, Howard, and Bradley then falsified the nature of the pocketknife, in order to justify the seizure they made. Barezky fabricated a scenario of Rosenthal being a potential murderer and had other employees do the same. Barezky, Bradley, Howard, and Ahlgren even saw to it that Rosenthal was punished for a federal crime.

These defendants violated Rosenthal's reasonable expectation of privacy and attempted to justify their actions by the criminalization of their victim. The standard for a search and seizure in the workplace is whether the employee has a reasonable expectation of privacy, given the context of the employee relationship. *O'Conner v. Ortega*, 480 U.S. 709 (1987). The conduct of the defendants is not only unreasonable. It is outrageous. As discussed above, such a warrantless search and seizure is entirely outside the "statutory scheme," as the Supreme Court made clear in *Bush*. Such conduct constitutes an uncompensated taking, also completely outside the statutory scheme. *Ingraham* and *Goss*, *supra* at 18.

In *Bush*, the Supreme Court also made clear that a suspension of 14 days or less is "not covered by this system" because there are "... no provisions for appeal for suspensions for 14 days or less." *Bush v. Lucas*, 462 U.S. 367, 385 n.28 (1983). Therefore, Rosenthal has no right to appeal to the MSPB, even if one views the conduct of the defendants as a "personnel action" which it clearly was not.

In order to support its conclusion that Rosenthal has only a personnel remedy through the MSPB, the circuit court cited *United States v. Fausto*, 484 U.S. 439 (1988). Fausto was initially dismissed from employment and subsequently suspended for 30 days for unauthorized use of a government vehicle. *Fausto*, at 440. He simply sought back pay under the Back Pay Act. *Id.*

Fausto was not charged with a federal crime and punished for that crime. It is irrelevant whether Fausto was in the excepted federal service or not. He never alleged a claim of Constitutional magnitude, as Rosenthal has. He was not a victim of police misconduct committed by those he called upon for help -- officers completely outside his agency. He was never the victim of a warrantless search

and seizure or uncompensated taking. Fausto never alleged a RICO conspiracy and had no evidence of such a claim.

Those outside Fausto's supervisory chain of command committed no tortious or criminal conduct toward him, in violation of the Constitution, RICO, and state law. Fausto made no allegation that the defendants in his case acted outside their official capacity. His case does not remotely resemble that of Rosenthal. As fully discussed above, the Supreme Court has made clear that such conduct which Rosenthal has alleged in detail is not barred by any administrative preemption or statutory scheme.

The Circuit Court also cited *Paige v. Cisneros*, 91 F.3d 40, 42 (7th Cir. 1996). Paige was discharged for insubordination only. *Paige*, at 41. In fact, the Circuit Court in *Paige* recognized: "... Paige lacks the sort of substantial constitutional claim that activates the rule requiring doubts to be resolved in favor of judicial review." The *Paige* court, therefore, also recognized that the lack of a Constitutional case did not require it to decide *if* Paige's claim was one in which:

> ... the CSRA does not affect the general grant of federal question jurisdiction in 28 U.S.C. § 1331 and waiver of sovereign immunity in 5 U.S.C. § 702 for cases seeking prospective relief. *Paige*, at 44.

Therefore, the Circuit Court in *Paige* recognized the problem which it did not have to address -- the same problem which the Circuit Court in this case elected to ignore. As in *Fausto*, the *Paige* case did not involve intentional and egregious Constitutional wrongdoing, criminal conduct in violation RICO, and intentional and egregious violations of state tort law. There were no allegations that the *Paige* defendants acted solely outside their official capacity. Therefore, the court in *Paige* did not have to address the split in authority which it recognized existed. *Id.*

Rosenthal's case states Constitutional claims which can only be "resolved in favor of judicial review." *Paige, supra.* This judicial review also needs to encompass the injunctive relief which only the judicial system can provide, especially since Rosenthal's case lies outside the "statutory scheme," as discussed above. This includes the clearing of his record, permitting him to carry a legal pocketknife,

and notification to suspects and defendants in other cases in which these FPS officers have been involved. The court is also needed, in order to have the dangerous weapon statute declared unconstitutional, because the definition of a "dangerous weapon" is fatally vague. Over the years, people have used any number of ordinary devices, instruments, materials, or substances to commit murder or serious bodily injury. This includes any knives at all, hat pins, scissors, hammers, screwdrivers, and countless other items. This statute only encourages the "arbitrary and discriminatory enforcement" which these defendants chose to visit on Rosenthal. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Use of such a vague statute offends the Due Process Clause.

The Circuit Court decided in another case that a federal inmate could bring a *Bivens* suit, because the administrative scheme to which he would otherwise be relegated did not contain adequate procedural safeguards which would protect his Constitutional rights and did not provide adequate deterrent value. *Bagola v. Kindt*, 131 F.3d 632 (7th Cir. 1997).

As in *Bagola*, Rosenthal cannot obtain any redress through the administrative scheme. He was punished for a federal crime, but the defendants were careful to suspend him for only 14 days. Therefore, as discussed above, he has no right to appeal to the MSPB. He has no redress for the search and seizure of his property or for its uncompensated taking, because those offenses are outside the CSRA. The defendants saw to it that he did not receive a fair hearing and he has no recourse to a hearing, because the statutory scheme provides none. Further, because the MSPB has no jurisdiction, there is no deterrent value for the defendants.

In this case, the Circuit Court stated *Bagola* does not apply, because of a "wholly different statutory scheme." App.5. As discussed in the preceding paragraph, this is a distinction without a difference. The problem for Bagola was that he could not establish facts which "rise to the level of constitutional significance." *Bagola*, at 647. Rosenthal has alleged and has already proven knowing and intentional violations of the Constitution which shock the conscience.

It is also important to note that only the judicial system can address the police misconduct of the employees of the GSA. The Circuit Court stated that the complaint sets forth only the failure to "properly investigate." App.3. The complaint alleges much more, in

regard to the GSA defendants. It alleges that these officers intentionally and knowingly made an illegal seizure, fabricated accounts of a dangerous weapon, and made false police reports to the U.S. Attorney and other agencies. None of this conduct is objectively reasonable and it establishes that the defendants used fabricated accounts to cover up an illegal seizure which they knew was not based on any articulable or reasonable need.

In *Soldal v. Cook County*, 506 U.S. 56 (1992), the Supreme Court held the conduct of officers violated the Fourth Amendment, under the standard of reasonableness, and that the police had furthered an enterprise, knowing that it was contrary to the law. *Soldal*, at 71-72. Rosenthal has no personnel relationship with the FPS. He called on these officers for help. Instead, they violated his Fourth and Fifth Amendment rights by making him more vulnerable to Constitutional deprivations by others and helped to create those deprivations themselves. *Gibson v. City of Chicago*, 910 F.2d 1510, 1521 n.19 (7th Cir. 1990). As with all these defendants, the FPS officers are entitled to no qualified immunity, because none of them did what "... a reasonable officer could have believed lawful." *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987).

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Seventh Circuit in Martin Rosenthal v. United States of America. In the event that the Petition is granted, Petitioner prays that the judgment of the Court below be reversed and that the cause be remanded.

Respectfully submitted,

Martin Rosenthal
Plaintiff
P.O. Box 803254
Chicago, IL 60680-3254
(773)334-4797

Supreme Court, U.S.
FILED

(2)

No. 99 173 JUL 26 1999

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

MARTIN ROSENTHAL,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX

Martin Rosenthal
Petitioner
P.O. Box 803254
Chicago, Illinois 60680
(773)334-4797

8pp
S.D.

APPENDIX A

JUDGMENT AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT- WITHOUT ORAL ARGUMENT

Date: April 28, 1999

BEFORE: Honorable RICHARD A. POSNER, Chief Judge

Honorable FRANK H. EASTERBROOK, Circuit Judge

Honorable MICHAEL S. KANNE, Circuit Judge

No. 98-3196

MARTIN ROSENTHAL,
Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA, KENNETH S. APFEL, Commissioner of Social Security Administration, DAVID J. BARRAM, Administrator of General Services Administration, et al.,
Defendants - Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 97 C 1424, James F. Holderman, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1060-110393)

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Submitted April 22, 1999*

Decided April 28, 1999

Before

Hon. RICHARD A. POSNER, Chief Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. MICHAEL S. KANNNE, Circuit Judge

No. 98 - 3196

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

MARTIN ROSENTHAL,
Plaintiff-Appellant,

v.

No. 97 C 1424

UNITED STATES OF AMERICA, et al.
Defendants-Appellees.

James F. Holderman, Judge

ORDER

Plaintiff Martin Rosenthal filed a thirteen count suit against

*After an examination of the briefs and the record, we have concluded that an oral argument is unnecessary, and the appeal is submitted on the briefs and the record. See Fed. R. App. P. 34(a)(2).

the United States, the Social Security Administration ("SSA"), the General Services Administration ("GSA"), nineteen named employees of the SSA and GSA as well as other unnamed employees of these agencies alleging tort, RICO, and constitutional violations in the confiscation of his Swiss Army knife at his federal workplace. The district court dismissed the suit for lack of subject matter jurisdiction. We affirm.

Rosenthal is an attorney in the Office of Hearings and Appeals of the SSA and the owner of a "Super Tinker" Swiss Army pocketknife. Rosenthal alleges that on January 16, 1996, Bonny Barezky, an employee at SSA, and Robert Howard, whom plaintiff alleges is an officer of the Federal Protective Service, confiscated his Swiss Army knife because they believed that Rosenthal's possession of the knife violated 18 U.S.C. § 930, which prohibits possession of certain dangerous weapons on federal facilities.

The day after his knife was confiscated, Rosenthal unsuccessfully sought to reclaim his knife from the SSA. Rosenthal contended that the longest blade in the Super Tinker knife was only 2 5/16 inches and therefore fell under the statutory exemption for knives with "a blade of less than 2 1/2 inches in length." 18 U.S.C. § 930(g)(2). The SSA concluded the blade of his knife exceeded 2 1/2 inches, including in its measurement of the blade both the sharpened edge and the small length of metal (the "tang") which connects the sharpened edge to the base of the knife.

Over lunch the following day, January 18, Rosenthal purchased a "Manager" pocketknife to replace the "Super Tinker" knife. He also purchased ties with pictures of Swiss Army pocketknives. Rosenthal returned to work with both the new pocketknife and the ties and showed them to colleagues in his office. Later that day, Rosenthal's office manager informed him he was being placed on administrative leave, allegedly for insubordination. Rosenthal was allegedly suspended for a total of 14 days without pay for possession of a dangerous weapon and insubordination.

Rosenthal filed suit in federal district court. His Third Amended Complaint contained thirteen counts. Counts one, two, and three claimed constitutional deprivations and sought damages under *Bivens v.* Six *Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and equitable relief. Count one claimed that the knife was illegally seized in violation of the Fourth Amendment. Count two alleged various actors violated his Fifth Amendment Due Process rights in failing to properly investigate whether the Super

Tinker knife was in fact legal. Count three claimed 18 U.S.C. § 930 was unconstitutionally vague in failing to define "blade." Counts four through twelve charged various torts, including intentional and negligent infliction of emotional distress, conversion in the seizure of the pocketknife, and slander and libel against a host of actors. Count thirteen alleged a RICO conspiracy among various employees of SSA and the GSA.

The United States moved to substitute itself for the named parties in each of the tort claims (counts four through twelve). It submitted a scope-of-employment certification that the employees named in the complaint were federal employees acting within the scope of their office or employment during the actions complained of, thereby making the United States the proper party to the action. *See* 28 U.S.C. § 2679(b)(1), § 2679(d)(1); *Taboas v. Mlynczak*, 149 F.3d 576, 578 n.1 (7th Cir. 1998). The United States excluded from this certification Robert Howard, whom Rosenthal alleges is a member of the FPS, based on the United States' belief that Howard is not a federal employee. The district court substituted the United States as party defendant for each of the tort claims with the exception of those against Howard. The United States also represented the federal defendants (everyone except Howard) on the constitutional claims.

On behalf of the federal defendants, the United States moved to dismiss the complaint arguing that the federal courts had no subject matter jurisdiction to entertain Rosenthal's claims. The district court concluded that Rosenthal's claims concerned personnel disputes and were therefore barred by the exclusive remedy provision of the Civil Service Reform Act of 1978 ("CSRA"), Pub. L. No. 95-454, 92 Stat. 1111 *et seq.* (codified as amended in various sections of 5 U.S.C.). The district court also included several alternative grounds for the dismissal of the claims against the federal defendants. On the claims against Howard, the district court initially entered a Rule *55(a)* default against Howard due to Howard's failure to defend the case, but declined to enter a default judgment under Rule 55(b) concluding that Rosenthal's claim lacked a legal basis.

We review the district court's dismissal of plaintiff's complaint de novo. *Eison v. McCoy*, 146 F.3d 468, 470 (7th Cir. 1998). We accept Rosenthal's allegations as true for the purposes of the motion to dismiss. *Hentosh v. Herman M Finch University of Health Sciences/The Chicago Medical School*, 167 F.3d 1170, 1173 (7th Cir. 1999).

Rosenthal alleges he is an excepted service employee of the SSA. As an excepted service employee, he was entitled to file a complaint with the Office of Special Counsel of the Merit Systems Protection Board ("MSPB"). *Feit v. Ward*, 886 F.2d 848, 852 (7th Cir. 1989). In enacting the CSRA., Congress gave exclusive jurisdiction over civil service personnel disputes to the MSPB. *United States v. Fausto*, 484 U.S. 439 (1988), *Paige v. Cisneros*, 91 F.3d 40, 42 (7th Cir. 1996).

Relying on *Bagola v. Kindt*, 131 F.3d 632 (7th Cir. 1997), Rosenthal argues that a complaint before the MSPB lacks adequate procedural safeguards and that his *Bivens* actions should therefore not be barred. *Bagola* is inapposite because it concerned a wholly different statutory scheme, the Federal Tort Claims Act. In any case, this Court in *Paige* held that an employee who had *no right* to submit a personnel dispute to the MSPB was nevertheless barred by the CSRA from bringing a civil service personnel dispute to federal court. Surely Rosenthal, who *does have the right* to bring a dispute before the MSPB, cannot complain of alleged procedural deficiencies.

All of Rosenthal's claims attack a personnel action undertaken by his federal employer. Bringing a dangerous weapon onto a federal facility is both a federal crime and a violation of the terms of employment of one who works on a federal facility. Had Barezky seized the knife and referred the matter to the U.S. Attorney's Office, the seizure would be the first step in a criminal prosecution. As it is, she seized the knife and initiated a personnel action. Everything that happened to Rosenthal from that point forward was a personnel dispute. The federal courts have no jurisdiction over federal civil service personnel disputes. Rosenthal's claims against the federal defendants are therefore barred.

For these same reasons, the district court lacked jurisdiction over Rosenthal's claims against Howard. Since we accept Rosenthal's allegations as true for the purposes of the motion to dismiss, we consider Howard to be a member of the Federal Protective Service as Rosenthal alleges. As such, a suit against Howard suffers from the same defect present in the claims against the other federal defendants, the absence of subject matter jurisdiction.

AFFIRMED.

APPENDIX B

JUDGMENT, OPINIONS, AND ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

AO 450(Rev.5/85)Judgment in a Civil Case

United States District Court
Northern District of Illinois
Eastern Division

DOCKETED
JUL 01 1998

Rosenthal

v.

US, et al

JUDGMENT IN A CIVIL CASE

Case Number 97 C 1424

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

X Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that on May 29, 1998 the motion of the United States to dismiss was granted and all defendants except Robert Howard were dismissed from this case.

Further ordered that the court declines to enter an order of default judgment against defendant Robert Howard. Counts 1, 2, 5 and 13 against defendant Howard are legally insufficient to support a default judgment and this court declines to exercise jurisdiction over Counts

4 and 7. Order of default against defendant Howard dated 2/11/98 is vacated. This case is dismissed in its entirety.

There being no just reason for delay, this is a final and appealable order.

Michael W. Dobbins, Clerk of Court

s/Kathleen Branch

Date: 6/29/98

Kathleen Branch, Deputy Clerk

Minute Order Form (06/97)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	James F. Holderman	**Sitting Judge if Other than Assigned Judge**

CASE NUMBER 97 C 1424 **DATE** 5/29/1998

CASE TITLE Martin Rosenthal vs. USA, et al

[in the following box (a) indicate the party filing the motion. e.g., plaintiff, defendant. 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) Filed motion of [use listing in "Motion" box above.]

(2) Brief in support of motion due _____

(3) Answer brief to motion due_____. Reply to answer due_____.

(4) Ruling/Hearing on _____ set for _____ at _____.

(5) Status hearing[held/continued to] [set for/re-set for] on_____set for_____ at.

(6) Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) Trial[set for/re-set for] on _____ at _____.

(8) [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) This case is dismissed [with/without] prejudice and without costs [by /agreement/pursuant to] FRCP4(m) General Rule 21 FRCP41(a)(1) FRCP41(a)(2).

(10) **X** [Other docket entry] Enter memorandum opinion and order that defendant United States' motion to dismiss is granted and all defendants except Robert Howard are dismissed from this case. plaintiff's motion to strike is denied. Status hearing and prove up of the defendant of Robert Howard is set for 6/16/98 at 10:00 a.m. All other pending motions are moot.

(11) **X** [For further detail see order attached to the original minute order.]

No notices required, advised in open court. **Document Number**

No Notices required

X Notices mailed by judge's staff. **3 number of notices**

Notified counsel by telephone **date docketed**

Docketing to mail notices **docketing deputy initials**

Mail AO 450 form. **5/29/1998 date mailed notice**

Copy to judge/magistrate judge.

courtroom deputy's initials **KB mailing deputy initials**

KB s/KB

Date/Time received in central Clerk's Office

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARTIN ROSENTHAL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 97 C 1424**
	)	
UNITED STATES OF AMERICA, et al,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

Plaintiff, Martin Rosenthal, on October 24, 1997 filed a thirteen-count "Third Amended Verified Complaint" against the United States of America, the Social Security Administration, the General Services Administration, and nineteen defendants in their individual and official capacities as employees of the Social Security Administration and the Federal Protection Services, which operates under the General Services Administration, along with other unnamed employees of the Social Security Administration and the General Services Administration, alleging that the defendants committed various constitutional and state violations relating to an incident in which plaintiff's Swiss Army pocket knife was confiscated. Defendant United States on behalf of all defendants except for one individual defendant, Robert Howard who the United States maintains is not a federal employee, has filed a motion to dismiss plaintiff's third amended verified complaint Plaintiff has filed a motion to strike the declaration of Thomas P. Walsh filed in support of defendant United States's scope of employment certification. For the following reasons, defendant United States's motion is granted and plaintiff's motion is denied.

BACKGROUND

Plaintiff alleges he is a Senior Attorney with the Office of Hearings and Appeals of the Chicago-South Office of the Social Security Administration ("SSA"). Plaintiff's office and the attorney section of the Chicago-South Office of Hearings and Appeals is located on the twelfth floor at 200 West Adams Street in Chicago, Illinois. Plaintiff alleges that on January 16, 1996, while he was at work in his office, defendant Barezky, an employee of the SSA, and defendant Howard, who plaintiff alleges is an officer of the Federal Protective Service ("FPS") but who defendant United States maintains is not a federal employee, seized plaintiff's Swiss Army "Super Tinker" pocket knife on the advice of defendants Ahlgren, McGinley, and Carey, all employees of the SSA, because the knife was considered to be a dangerous weapon. The next day, January 17, 1996, plaintiff contacted defendant Kvachkoff, the District Director of the FPS, to attempt to get his pocket knife back. Defendant Kvachkoff allegedly sent defendant Bradley, an employee of the FPS, to speak with plaintiff and defendant Barezky to determine if the knife was legal. Federal law, 18 U.S.C. § 930, prohibits the possession of certain dangerous weapons in federal facilities but contains an exception for pocket knives that have blades which measure less than two and one-half inches in length. Defendants Bradley and Holderbaum, an employee of the FPS, then allegedly took the pocket knife and defendant Bradley informed plaintiff and the United States Attorney that the pocket knife was illegal. Defendants Barezky and Anderson, plaintiff's office manager at the SSA, on January 18, 1996 went to plaintiff's office and informed plaintiff that he was being placed on administrative leave and escorted plaintiff out of the building.

On January 22, 1996, plaintiff called defendant Kvachkoff and Maxse, Regional Counsel for the General Services Administration ("GSA"), relating that he, plaintiff, believed defendant Bradley was measuring the blade of the pocket knife incorrectly. Plaintiff then went to the office of the FPS where defendant Negrete, an employee of the FPS, returned the pocket knife to plaintiff and escorted plaintiff out of the building. Plaintiff, at 5:30 p.m. that same day, went to his office to clean out his desk and was allegedly supervised by defendants Anderson and Howard.

On January 30, 1996, defendant Barezky allegedly informed plaintiff that he should return to work but that plaintiff could no longer possess any kind of knife. When plaintiff returned to work,

defendant Barezky allegedly had defendant Howard escort plaintiff throughout the office and defendant Barezky referred plaintiff for psychological counseling. On February 23, 1996, defendant Barezky proposed that plaintiff be suspended for fourteen days. Defendant Ahlgren, with the approval of defendant Boyer, an employee of the SSA, suspended plaintiff for fourteen days for having a dangerous weapon. Plaintiff claims defendant McKay, a facilitator of labor relations for the SSA, conducted an investigation but did not interview plaintiff or examine the pocket knife himself. Plaintiff also claims that defendants Goodemote, Kaplan, Grant, and Lopatka, all employees of the SSA, contributed to the seizure of plaintiff's pocket knife as well as the other discipline imposed on plaintiff by alleging that plaintiff threatened them with knives and acted in a dangerous manner towards them.

On July 11, 1996, plaintiff filed identical administrative tort claims with the SSA and the GSA seeking damages as a result of the incidents related to the taking of the pocket knife and disciplinary action. Both of plaintiff's claims were subsequently denied. Plaintiff thereafter filed a complaint with this court. Plaintiff's current Third Amended Verified Complaint containing thirteen counts is the subject of the pending motion to dismiss.

STANDARD OF REVIEW

In ruling on a motion for dismissal, the court must presume all of the well-pleaded allegations of the complaint to be true. Miree v. DeKalb County, 433 U.S. 25, 27 n.2, 97 S.Ct. 2490, 2492 n.2 (1977). In addition, the court must view those allegations in the light most favorable to the plaintiff. Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1039 (7th Cir. 1987). Dismissal is proper only if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957).

ANALYSIS

I. Matters Outside the Pleadings

Defendant[1] has attached the declaration of Paul J. Maxse, Exhibit A, to its motion to dismiss and has referred to Exhibit A of plaintiff's original complaint in footnote two on page two of defendant's Memorandum in Support of Defendant's Motion to Dismiss. Because plaintiff has since filed a third amended verified complaint, plaintiff's original complaint was superseded and is not a part of the pleadings. In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, this court must either exclude any matters presented that are outside the pleadings or convert the motion to one for summary judgment providing all parties reasonable opportunity to present any necessary materials. Fed. R. Civ. P. 12(b); Carter v. Stanton, 405 U.S. 669, 671, 92 S.Ct. 1232, 1234 (1972); Edward Gray Corp. v. National Union Fire Ins. Co., 94 F.3d 363, 366-67 (7th Cir. 1996). This court has determined that it need not consider either of defendant's materials which are outside the pleadings in ruling on defendant's motion to dismiss, therefore there is no need to convert defendant's motion to dismiss into a motion for summary judgment. Accordingly, this court is specifically excluding the declaration of Paul J. Maxse, Exhibit A, and defendant's reference to statements from plaintiff's original complaint.

II. Civil Service Reform Act

Defendant first argues that all of plaintiff's claims are barred by the exclusive remedy provision of the Civil Service Reform Act of 1978

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[1]The term "defendant" as hereinafter used, unless otherwise specified, refers to all of the defendants on whose behalf the motion to dismiss was filed, all defendants except for Robert Howard who defendant contends is not, and was not at the time of the alleged events, a federal employee. Plaintiff himself refers to defendant Howard as an "office guard" on page three of Exhibit A attached to his second amended complaint which is incorporated by reference in his Third Amended Verified Complaint.

("CSRA"). Public Law No. 95-454, 92 Stat. 1111 et seq. (codified in various sections of Chapter 5 of the United States Code, primarily 5 U.S.C. §§ 1214, 2302 are pertinent). Congress, through the CSRA, gave exclusive jurisdiction over civil service personnel disputes to the merit systems protection board (MSPB). Paige v. Cisneros, 91 F.3d 40, 42 (7th Cir. 1996). Plaintiff, as an excepted service employee of the SSA, was entitled to file a complaint with the Office of Special Counsel ("OSC") of the MSPB. Feit v. Ward, 886 F.2d 848, 852 (7th Cir. 1989). The OSC is authorized to receive any allegation of a prohibited personnel practice which "encompasses violations of a federal employee's constitutional rights." 5 U.S.C. § 2302; Feit, 886 F.2d at 852. Because of the CSRA's remedial scheme, actions filed under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999 (1971), are not recognized when related to federal personnel decisions. Bush v. Lucas, 462 U.S. 367, 388-90, 103 S. Ct. 2404, 2417 (1983).

The allegations in plaintiff's third amended verified complaint stem from plaintiff's belief that his pocket knife was unconstitutionally seized by defendants and that such seizure and libel and slander from colleagues, all the result of a purported conspiracy, led to an improper discipline action and emotionally distressed him. Plaintiff seeks monetary damages, correction of his personnel record and GSA reports to remove his disciplinary action, and to have the policy barring plaintiff and other employees from possessing a pocket knife or other items of cutlery and seizure of such items enjoined. In reviewing plaintiff's various allegations and desired remedies, this court concludes that this court does not have jurisdiction over many of plaintiff's claims. Plaintiff's allegations that defendants engaged in prohibited personnel practices that constituted constitutional violations are claims that plaintiff should have brought before the OSC. Feit, 886 F.2d at 855.

Plaintiffs argument that the decision in Bush specifically excepted certain actions against federal employees such as warrantless searches or uncompensated takings may have some merit. Bush , 462 U.S. at 385 n.28, 103 S. Ct. at 2415 n.28. The court, therefore, will address such claim separately later in this opinion. Plaintiff's arguments, however, that an administrative remedy would not be adequate to compensate him for the harms he allegedly suffered and that he may have no administrative remedy for some of his employment related claims have been considered and rejected by the United States Supreme Court. Schweiker v. Chilicky, 487 U.S. 412, 425-28,

108 S. Ct. 2460, 2468-70 (1988); Bush, 462 U.S. at 388-90, 103 S. Ct. at 2417. Furthermore, even when a federal employee does not have a right to MSPB review, the CSRA repealed the jurisdiction of federal district courts over personnel related actions. Paige, 91 F.3d at 43 (citing United States v. Fausto, 484 U.S. 439, 108 S. Ct. 668 (1988)). Accordingly, this court lacks subject matter jurisdiction over all of plaintiff's allegations against defendants relating to plaintiff's claims that he was improperly disciplined and placed on administrative leave, plaintiff's request that his personnel record be changed to remove all record of disciplinary action, plaintiffs claim for intentional and negligent infliction of emotional distress from such conduct, and plaintiff's request for damages for such conduct. Such claims are not subject to review by this court. Paige, 91 F.3d at 43; Feit, 886 F.2d at 858.

III. Fourth Amendment Seizure & Qualified Immunity

Count I of plaintiffs third amended verified complaint alleges that plaintiffs pocket knife was illegally seized in violation of his Fourth Amendment rights. While plaintiff's claim could be construed as contesting an employment decision and therefore barred from consideration, defendant also argues that even if plaintiff's claim is not barred, plaintiff has failed to state a claim and qualified immunity precludes plaintiff's claim.

The Fourth Amendment provides in pertinent part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. The United States Supreme Court has determined that a seizure of property occurs when "there is some meaningful interference with an individual's possessory interests in that property." United States v. Jacobsen, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656 (1984). The Fourth Amendment's protection applies to personal property in the civil context. Soldal v. Cook County, 506 U.S. 56, 67, 113 S. Ct. 538, 546-47 (1992). Whether the Fourth Amendment was in fact violated is a separate question that requires determining if the seizure was reasonable. The reasonableness determination will reflect a "careful balancing of governmental and private interests." New Jersey v. T.L.O., 469 U.S. 325, 341, 105 S. Ct. 733, 742 (1985). In Soldal, the Supreme Court set out a high hurdle for persons challenging the reasonableness of a seizure. Soldal, 506 U.S. at 71-72, 113 5. Ct. at 549.

In this case, defendant took plaintiff's pocket knife with the belief that the pocket knife possessed a blade that was longer than two and one-half inches in violation of 18 U.S.C. § 930. Taking possession of plaintiff's pocket knife was necessary since it was reasonably suspected to be unlawful. See T.L.O., 469 U.S. at 341, 105 S. Ct. at 742 (stating that a seizure based on suspicions that although reasonable do not rise to the level of probable cause are legal). The pocket knife was an instrumentality of an alleged crime, possession of an unlawful dangerous weapon in a federal facility. See Jacobsen, 466 U.S. at 123-22 & n.20, 104 S. Ct. at 1661 & n.20 (stating that it is well settled that it is constitutionally reasonable for officials to seize items based on an articulable suspicion of criminal activity). Whether or not the blade was longer than two and one-half inches, there was nothing unreasonable about the seizure of the pocket knife at the time. The government's and public's interest in preventing persons from possessing dangerous weapons in a federal facility is far greater than plaintiffs interest in possessing his pocket knife while at work. Even if the pocket knife was legal, defendants did not act unreasonably by taking the knife for measurement to determine if it was illegal. If a seizure is objectively reasonable, the motives of defendants will not turn the seizure into a violation of the Fourth Amendment. Gossmeyer v. McDonald, 128 F.3d 481, 493 (7th Cir. 1997) (discussing the related concept of reasonable search under the Fourth Amendment). Thus, plaintiff cannot state a claim for violation of his Fourth Amendment right.

Even if plaintiff had stated a claim, defendant would be entitled to qualified immunity. Qualified immunity shields government agents from liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). "Thus, the defendant is immune from suit if the conduct at issue did not violate a right that was clearly established when the conduct occurred, so that the defendant would not have been on notice that his [or her] behavior was 'probably unlawful.'" Magdziak v. Byrd, 96 F.3d 1045, 1047 (7th Cir. 1996) (quoting Montville v. Lewis, 87 F.3d 900, 902-03 (7th Cir. 1996)). To determine whether qualified immunity is applicable in a case, the court must make a two-part inquiry: (1) does the alleged conduct set out a constitutional violation; and (2) were the constitutional standards clearly established at the time in question. Estate of

Stevens v. City of Green Bay, 105 F.3d 1169, 1174 (7th Cir. 1997). A negative answer to either of the two prongs of this inquiry will conclude the issue and lead to the determination that qualified immunity is applicable. Chan v. Wodnicki. 123 F.3d 1005, 1008 (7th Cir. 1997).

First, plaintiff has not set out a constitutional violation. Even if plaintiff had, in the second part of the inquiry, the court must determine whether, at the time of the alleged illegal act, the right asserted by the plaintiff was clearly established in the particular factual context presented. Jones v. Webb 45 F.3d 178, 183 (7th Cir. 1995). The plaintiff bears the burden of demonstrating the violation of a clearly established right. Magdziak, 96 F.3d at 1047. The unlawfulness of the defendant's alleged act should be clear in light of preexisting law. Jones, 45 F.3d at 183. Plaintiff points to no law that states that an illegal seizure occurs when an instrumentality of an alleged crime is taken, even if at some later point it is determined that no crime occurred. See, e.g., United States v. Richards, 937 F.2d 1287, 1290-91 (7th Cir. 1991) (finding no Fourth Amendment violation when officers reasonably believed at the time of the incident that there was probable cause to disarm and arrest individual even if individual was not later charged with assault). At the time, defendant had no conclusive proof that no crime was occurring. There is no evidence in the record that defendant took the pocket knife for any other purposes than for precautionary safety purposes and to determine if the knife violated 18 U.S.C. § 930. Moreover, plaintiff had defendant Howard sign two original receipts after plaintiff handed over his pocket knife. Plaintiff kept one receipt and defendant Howard allegedly took one himself. Plaintiff's pocket knife was returned to him once he asked for it on January 22, 1996 and plaintiff was allowed to take it out of the building. Therefore the detention of the pocket knife was for a short time. Based on these facts, defendant reasonably believed a dangerous situation could exist and defendant's interest in taking the pocket knife, based on an important and immediate need to protect the public, outweighed any conceivable privacy interests at stake. Defendant acted reasonably in light of the facts known at the time of the actions. "Immunity is intended to protect officers from any objectively reasonable decisions, including those that are wrong." Hinnen v. Kelly, 992 F.2d 140, 143 (7th Cir. 1993). Furthermore, it was not clearly established at the time of the seizure that the seizure was unlawful or that plaintiff had a

constitutional right to possess his pocket knife. Accordingly, Count I must be dismissed.

IV. Fifth Amendment Due Process & Qualified Immunity

Count II of plaintiff's third amended verified complaint alleges that the FPS officer defendants failed to reasonably investigate and correct the allegation that plaintiffs pocket knife was illegal and that the officer defendants had the obligation to determine whether plaintiffs pocket knife was legal and to prevent the continued seizure and deprivation of the pocket knife. Plaintiff also alleges that the officer defendants were recklessly indifferent and breached their duty as federal officers by falsely stating the length of the pocket knife blade and refusing to correct the record of plaintiffs misconduct. Defendant argues that plaintiff has not stated a constitutional claim and even if he has, the FPS officer defendants are entitled to qualified immunity.

Plaintiff has failed to state a claim for violation of his due process rights. Plaintiff was not arrested by the officer defendants nor detained by them. Plaintiff in his own third amended verified complaint states that the officers responded to plaintiffs first call to the FPS and spoke with plaintiff and others regarding the incident. That the result of the officers' investigation was to find the pocket knife in violation of the federal statute, a result with which plaintiff disagrees, does not mean that the officers did not reasonably investigate plaintiff's complaint. Plaintiff also has no constitutionally protected, affirmative right to governmental aid. The Due Process Clause confers "no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 196, 109 S. Ct. 998, 1003 (1989). Plaintiff states that defendants breached their duty. Plaintiff, however, fails to allege what constitutional duty the officer defendants had in relation to plaintiff. The officer defendants were not even required by the Constitution to perform an error-free investigation. Baker v. McCollan, 443 U.S. 137, 146, 99 S. Ct. 2689, 2695 (1979). Remedies for an alleged violation of a duty of care are found in tort law, not through a violation of the Constitution. Id. In essence, plaintiff is dissatisfied that his pocket knife was found to have a blade longer that two and one-half inches. He basically alleges that the officer defendants should have

found plaintiff's pocket knife to be lawful and that the officer defendants should have plaintiffs records corrected. Such allegations do not amount to a constitutional deprivation of plaintiff s due process rights.

Even if plaintiff had stated a claim, the officer defendants would be entitled to qualified immunity. As stated above, qualified immunity shields government agents from liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow, 457 U.S. at 818, 102 S. Ct. at 2738. Reviewing the two-part inquiry, first plaintiff has not set out a constitutional violation. Second, even if plaintiff had, plaintiff has not met his burden of demonstrating the violation of a clearly established right. Magdziak. 96 F.3d at 1047. Plaintiff has not pointed to any case law, let alone any closely analogous case law, to support his position that there was a clearly established constitutional standard at the time of the incident that he had a constitutional right to possess his pocket knife or that the officer defendants breached any duty owed to plaintiff. The facts alleged demonstrate that the officer defendants acted reasonably. Furthermore, the law is that a police officer does not have a clearly established constitutional duty to continue to investigate a crime. Kompare v. Stein, 801 F.2d 883, 890 (7th Cir. 1986). Nor is there a clearly established constitutional duty to investigate thoroughly. Id. Plaintiff has failed to state a claim, and even if he had stated a claim, the officer defendants would be entitled to qualified immunity. Accordingly, Count II must be dismissed.

V. Unconstitutionality of 18 U.S.C. § 930(g)(2)

Count III of plaintiffs third amended verified complaint alleges that 18 U.S.C. § 930(g)(2), the statute under which plaintiff was allegedly punished by his superiors, is void under the Fifth Amendment because it is vague and overbroad. Plaintiff claims that the statute is unconstitutional on its face and as applied to him. Plaintiff, however, was not criminally prosecuted for violating the statute. The statute, therefore, was not applied to plaintiff. Whether or not plaintiff was improperly disciplined as a result of having a pocket knife believed to be in violation of the statute is a personnel matter that, as stated above, is not a proper subject for judicial review.

The statute 18 U.S.C. § 930 prohibits the possession of certain dangerous weapons in federal facilities but contains an exception for pocket knives that have blades which measure less than two and one-half inches in length.[2] Since the law does not affect constitutionally protected conduct, it cannot be overbroad. Village of Hoffman Estates v. Flipside Hoffman Estates., Inc., 455 U.S. 489, 497, 102 S. Ct. 1186, 1193 (1982). See also United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987) (stating that the Supreme Court has not found a statute overbroad except in the limited context of the First Amendment). Thus to succeed on his claim, plaintiff must allege and demonstrate that the law is impermissibly vague in all of its applications. Hoffman Estates 455 U.S. at 497, 102 S. Ct. at 1193. In order to determine if the law is vague, since there is no First Amendment freedom involved, the law must be examined in light of the facts of the case at hand. Illinois Council on Long Term Care Inc. v. Shalala, No. 97-2315, slip op. at 8 (7th Cir. May 8, 1998). There is, however, no case at hand because plaintiff was never criminally prosecuted under the statute. Plaintiff was punished by his employer, but, as stated above, the CSRA preempts judicial review at this time.

Even if this court examined plaintiffs argument, there can be no relief. Plaintiff argues that the statute is vague on its face since the term "blade" is not defined. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858 (1983); Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298 (1972). "It is a basic principle of

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[2] 18 U.S.C. § 930 in relevant part states that "whoever knowingly possesses or causes to be present a firearm or other dangerous weapon in a Federal facility (other than a Federal court facility), or attempts to do so, shall be fined under this title or imprisoned not more than 1 year, or both." 18 U.S.C. § 93 0(a). The term "Federal facility" is defined as "a building or part thereof owned or leased by the Federal Government, where Federal employees are regularly present for the purpose of performing their official duties." 18 U.S.C. § 930(g)(l). The term "dangerous weapon" is defined as "a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length." 18 U.S.C. § 930(g)(2).

due process that an enactment is void for vagueness if its prohibitions are not clearly defined." Grayned, 408 U.S. at 108, 92 S. Ct. at 2298. Due process demands that statutes give fair warning as to the conduct that is prohibited. Id. A statute, therefore, is void for vagueness if people of ordinary intelligence are forced to guess at the meaning of the statute and differ as to its application. Smith v. Goguen, 415 U.S. 566, 574, 94 S. Ct. 1242, 1248 (1974).

Plaintiff cites the American Heritage Dictionary of the English Language in which the term "blade" is defined as "the flat-edged cutting part of a sharpened tool or weapon." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 75 (1970).[3] This is the same definition given in other dictionaries. See, e.g. AMERICAN HERITAGE DICTIONARY 185 (2d College ed. 1982); WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 179 (1984). Plaintiff attempts to create confusion over the definition of the term "blade" by arguing that a blade does not include the part of the metal that is nearest the handle. The term "knife," however, is defined as "a cutting instrument consisting of a sharp blade with a handle." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE at 393; AMERICAN HERITAGE DICTIONARY at 704. See also WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY at 668 (providing the almost identical definition of "a cutting instrument having a sharp blade with a handle"). Thus the blade on a knife is everything except for the handle. The definition of a blade does not exclude the part nearest the handle of a knife. There is nothing that is vague or overbroad in the statute. There is consensus among the dictionaries as to the definition of the word "blade." Any person of ordinary intelligence would clearly understand and be on notice that a pocket knife with a blade, the part that is not the handle, that is longer than two and one-half inches in length cannot be brought into a federal facility. The statute, 18 U.S.C. § 930(g)(2), provides adequate notice of what conduct is prohibited. Under commonly understood usage of the term

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[3] This court considered plaintiff's photocopies of the relevant pages of this dictionary as authority for the relevant definitions as it did with the other dictionaries cited in this opinion.

"blade," there can be no conclusion that the statute is impermissibly vague. Accordingly, Count III of plaintiffs third amended verified complaint must be dismissed.

VI. Plaintiffs Motion to Strike

Counts IV—VI and VIII—XII of plaintiff's third amended verified complaint contain tort claims against various government employee defendants. Plaintiff filed his administrative tort claims, a prerequisite to Federal Tort Claims Act jurisdiction, 28 U.S.C. § 2675, with both the GSA and the SSA in July 1996. Defendant United States has certified that the individual defendants, except for Robert Howard,
were acting within the scope of their employment with respect to plaintiffs tort claims, and has requested that the United States be substituted as the defendant for the tort claims, except as against Robert Howard. 28 U.S.C. § 2679(d)(1). Plaintiff, however, has filed a motion to strike the declaration of Thomas P. Walsh filed in support of defendant's scope of employment certification and objects to the scope of employment certification.

Plaintiff has the burden of showing that the conduct of the individual government employee defendants was not within the scope of their employment. Hamrick v. Franklin, 931 F.2d 1209, 1211 (7th Cir. 1991). Illinois law governs whether the individual government employee defendants were acting within the scope of employment. Snodgrass v. Jones, 957 F.2d 482, 484 (7th Cir. 1992). Conduct of an employee is within the scope of employment if it is of the kind he or she is employed to perform, it occurs substantially within the authorized time and space limits, and it is actuated, at least in part, by a purpose to serve the master. Id. at 485. The United States has submitted the declaration of Thomas P. Walsh, Assistant United States Attorney and Chief of the Civil Division in the Northern District of Illinois, to support its decision to certify that the individual government employee defendants were all acting within the scope of their employment. The declaration states that the decision to certify was based upon reading the allegations in plaintiffs third amended verified complaint and concluding that all of the activities of which plaintiff complains pertain to activities in which the individual government employees are reasonably expected to engage and occurred in the workplace during working hours. This court agrees with the government's decision to certify that the individual government

employees were all acting within the scope of their employment. Employees of the FPS were investigating an allegation that plaintiff had a potentially unlawful weapon in his possession within a federal facility. The FPS is responsible for the safety of federal facilities, accordingly FPS employees' actions taken in response to a potential threat would be within the scope of their employment. The reporting of and actions taken in response to alleged threatening behavior of plaintiff by other SSA employees and the reporting of and actions taken in response to an allegedly unlawful dangerous weapon in plaintiff's possession in a federal facility would be within the SSA employees' scope of employment. Whether or not plaintiff was indeed in possession of an unlawful weapon does not affect the fact that the individual government employees were acting within the scope of their employment. Plaintiff presents absolutely no evidence that contradicts the certification that the individual government employees were all acting within the scope of their employment. Therefore, his objection to the certification is denied.

Plaintiff only argues that the declaration should be stricken since it is insufficient. On January 14, 1998, this court, in response to plaintiff, ordered the government to submit a declaration stating the reasons for the conclusion that the individual government employees were acting within the scope of their employment. The government complied by submitting the declaration of Thomas P. Walsh on February 3,1998. Plaintiff argues that the government failed to respond to his motion for discovery and an evidentiary hearing in the declaration. Plaintiff's motion, however, was denied by this court on January 14, 1998. There is also no basis for plaintiff to assume that the declaration had to comply with the standards for motions for summary judgment or that this court would apply Rule 56 to the declaration. The declaration submitted complied with this court's order. The declaration explicitly states why the government submitted the scope of employment certification. As stated above, this court agrees with the government's conclusion. Plaintiff has presented no reason to justify striking the declaration. Plaintiffs motion to strike is denied and pursuant to 28 U.S.C. § 2679(d)(1), the United States is substituted as the party defendant in place of defendants Ahlgren, Barezky, McGinley, Carey, Anderson, McKay, Goodemote, Lopatka, Kaplan, Grant, Maxse, Kvachkoff, Negrete, Bradley, and Holderbaum with respect to Counts IV—VI and VIII—XII of plaintiffs third amended verified complaint.

VII. Federal Tort Claims Act Allegations are Time-Barred

Defendant argues that plaintiffs tort claims, Counts IV—VI and VIII—XII of plaintiffs third amended verified complaint, were filed too late and are therefore time-barred. By statute, 28 U.S.C. § 2401(b), plaintiff had six months from the date after the mailing of the notice of the final denial of his claim to file his complaint in federal court. Tribue v. United States, 826 F.2d 633 (7th Cir. 1987).

Plaintiff filed administrative tort claims with both the GSA and the SSA in July 1996. Plaintiff maintains that the GSA was the de facto lead agency and the denial of plaintiffs claim by the GSA is the date by which the limitation period should be computed. Pl.'s Br. in Supp. of Opp'n to Mot. to Dismiss at 11. Defendant accepts this fact. Reply Br. of Fed. Defs. in Supp. of Mot. to Dismiss at 3. The letter mailed by the GSA as the final denial of plaintiffs administrative tort claims is attached as an exhibit to plaintiffs second amended complaint which is incorporated in plaintiffs third amended verified complaint. The GSA's final denial letter is dated August 30, 1996 and plaintiff states that the final letter was mailed on August 30, 1996 and agrees that the six-month limitation period began on August 31, 1996. Exhibit A p. 32; P1.'s Br. in Supp. of Opp'n to Mot. to Dismiss at 11. Accordingly, the six-month limitation period began on the date after the mailing of the letter, August 31, 1996. Tribue, 826 F.2d at 635. Six months after August 31, 1996 would have been Friday, February 28, 1997. Id. at 636. Thus, plaintiff had until and including February 28, 1997 to file his complaint containing his tort claims in federal court. Plaintiff, however, filed his complaint with the Clerk of this court on March 3, 1997.

Plaintiff argues that Rule 6(e) of the Federal Rules of Civil Procedure applies to the six-month limitation period and thus he had three extra days in which to file his complaint. Rule 6(e) states that when a party is required to act within a prescribed period after service of notice and the notice is served by mail, three days are added to the prescribed period. Fed. R. Civ. P. 6(e). Rule 6(e), however, is not applicable to the limitation period of 28 U.S.C. § 2401(b). Section 2401(b) must be strictly construed "because it is an integral part of the government's waiver of sovereign immunity." Tribue, 826 F.2d at 636. Section 2401(b) states that the action must begin within six months after the date of mailing of notice of the final denial of the claim. 28 U.S.C. § 2401(b). There is no reference to Rule 6(e) and furthermore the date of calculation in section 2401(b)

begins within six months after the date of mailing which is not the same activity, service of notice, as that described in Rule 6(e). Plaintiff points to no authority that Rule 6(e) is applicable to section 2401(b) and in fact other courts that have considered this argument have rejected it. See, e.g., Hatchell v. United States, 776 F.2d 244, 246 (9th Cir. 1985); Carr v. Veterans Administration, 522 F.2d 1355, 1357 (5th Cir. 1975). Section 2401(b) is explicit that the time begins after the date of mailing. Plaintiff had no more than those six months in which to sue. Tribue, 826 F.2d at 636. Since plaintiff did not begin his action in this case within the appropriate time period, his tort claims against defendant are time barred. Therefore, plaintiffs tort claims against the United States, Counts IV—VI and VIII—XII, are dismissed.

VIII. Sovereign Immunity

Even if plaintiffs tort claims were not time barred, defendant maintains that most of plaintiffs tort claims are excluded from the Federal Tort Claims Act (FTCA) limited waiver of sovereign immunity. Counts VI and VIII—XII of plaintiffs third amended verified complaint all contain allegations of either libel or slander. Both types of claims are specifically excluded by 28 U.S.C. §2680(h). Plaintiff presents no evidence or argument as to why these claims are not excluded. Plaintiff only argues that the scope of employment certification for the individual defendants should be stricken. As stated above, the scope of employment certification will not be stricken. Accordingly, even if plaintiffs tort claims were not time barred, defendant's motion to dismiss Counts VI and VIII—XII must be granted since these claims are excluded by 28 U.S.C. § 2680(h).

IX. Conversion

Even if plaintiffs tort claims were not time barred, Count V of plaintiffs third amended verified complaint fails to state a proper claim. Count V of plaintiffs third amended verified complaint alleges that defendant committed the Illinois common law tort of conversion. To state a cause of action for conversion, plaintiff must allege: (1) an unauthorized and wrongful assumption of control, dominion, or ownership by defendant over plaintiffs personal property; (2) the plaintiffs right in the property; (3) the plaintiffs right to immediate, absolute, and unconditional possession of the property; and (4) the

plaintiffs demand for possession of the property. Hoffman v. Allstate Ins. Co., 85 *Ill.* App. 3d 631, 633 (2d Dist. 1980). Plaintiffs third amended verified complaint fails to allege that plaintiff made demand for possession which is a required allegation. Rybak v. Provenzale, 181 Ill. App. 3d 884, 890 (2d Dist. 1989); Hoffman, 85 Ill. App. 3d at 633-34. In fact, plaintiffs third amended verified complaint states that when plaintiff went to the office of the FPS on January 22, 1996 in his first attempt to retrieve his pocket knife, his pocket knife was immediately returned ~ him by defendant Negrete. Furthermore, as stated above, defendant was acting reasonably when it confiscated plaintiffs pocket knife in a belief that plaintiff was violating criminal statute 18 U.S.C. § 930, thus plaintiff cannot show that defendant wrongfully assumed control over the pocket knife or that plaintiff had the right to immediate, absolute, and unconditional possession. Accordingly, even if plaintiffs tort claims were not time barred, plaintiff has not stated a claim upon which relief may be granted and Count V must be dismissed.

X. RICO Violation

Defendant's final argument is that plaintiff has failed to state a claim for violation of civil RICO, Racketeer Influenced and Corrupt Organizations Act, in Count XIII of plaintiffs third amended verified complaint. 18 U.S.C. § 1962(c). The elements of a RICO violation consist of: (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity. Sedum, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S. Ct. 3275, 3285 (1985). A pattern of racketeering activity consists of at least two predicate acts of racketeering committed within a ten-year period. 18 U.S.C. § 1961(5). Predicate acts are indictable acts specified in a list in 18 U.S.C. § 1961(1).

Plaintiff, in Count XIII, alleges that the SSA and the GSA are enterprises and the individual government employees, also an association in fact, conducted the affairs of the enterprises through a pattern of racketeering. The racketeering activity alleged include creating a false record that plaintiff had a dangerous weapon and filing fraudulent police reports and other reports by mail, telephone, and facsimile. First, as stated above, to the extent that plaintiff is contesting any action taken regarding his employment, such claims are barred by the CSRA. Second, plaintiff has failed to allege a proper RICO claim for many reasons.

Plaintiff alleges that the individual government employee defendants are an association in fact. Plaintiff makes no allegation as to how these individuals possibly constitute an enterprise since he does not allege that they are associated together for a common purpose of engaging in a course of conduct and function as a continuing unit. Richmond v. Nationwide Cassel L.P., 52 F.3d 640, 644 (7th Cir. 1995). "An enterprise 'must be more than a group of people who get together to commit a pattern of racketeering activity.'" Id. at 645 (quoting United States v. Neapolitan, 791 F.2d 489, 499-500 (7th Cir. 1986)). The enterprise must have a structure and goals separate from the predicate acts. Id. Clearly the individual government employee defendants together do not constitute an enterprise. The plaintiffs alleged association in fact enterprise does not have a separate and lasting identity apart from the individual government employee defendants themselves. Chicago HMO v. Trans Pacific Life Ins. Co., 622 F. Supp. 489, 494-95 (N.D. Ill. 1985).

Even if plaintiff had properly identified an enterprise, and considering plaintiff's allegation that the GSA and the SSA constituted the enterprises, plaintiff's claim still would not survive dismissal because he does not allege that defendants conducted or participated, directly or indirectly, in the conduct of such enterprises' affairs through a pattern of racketeering activity. Richmond, 52 F.3d at 646. One requirement of a sufficient RICO claim is a showing that the RICO defendant was involved in the operation or management of the affairs of the enterprise. Reves v. Ernst & Young, 507 U.S. 170, 183-85, 113 S. Ct. 1163, 1172-73 (1993). The defendant must have some degree of direction over some portion of the activities of the enterprise. id. at 179, 113 S. Ct. at 1170. Plaintiff has not alleged nor could he possibly show that the individual government employee defendants have such control over the affairs of the SSA or the GSA. Nor has plaintiff alleged that the individual government employee defendants participated in the conduct of the enterprises' affairs and not merely their own affairs. Richmond, 52 F.3d at 646.

Plaintiff also has failed to state how the mailing out of police reports and the telephone conversations regarding defendants' belief that plaintiff had in his possession an unlawful dangerous weapon constitutes mail or wire fraud. To establish mail or wire fraud plaintiff must show that defendants participated in a scheme to defraud and used the mail or wires or knowingly caused to be used the mail or wires for the purpose of executing the scheme. Richards v. Combined Ins. Co., 55 F.3d 247,249-50 (7th Cir. 1995). Plaintiff must establish

that defendants had a scheme to defraud him and that defendants had the intent to implement such a scheme. Without such an intent, there can be no mail or wire fraud. Id. at 252. Plaintiff's third amended verified complaint fails to articulate any scheme to defraud plaintiff or the fraudulent intent of defendants. Thus, plaintiffs allegations do not constitute mail or wire fraud and cannot be considered predicate acts for purposes of RICO. McDonald v. Schencker, 18 F.3d 491,495 (7th Cir. 1994). Moreover, to plead mail or wire fraud plaintiff must show, among other elements, that defendants made false representations intentionally to induce plaintiff to act and plaintiff relied on the representations. Associates in Adolescent Psychiatry, S.C. v. Home Life Ins. Co., 751 F. Supp. 727, 730 (N.D. Ill. 1990). There is absolutely no allegation that defendants intended to induce plaintiff to act or that plaintiff relied on anything defendants allegedly mailed or wired regarding the pocket knife incident. Plaintiff has simply not alleged any criminal conduct on the part of defendants.

Furthermore, even if plaintiff's allegations of defendants' actions could be considered criminal conduct, plaintiff has failed to state how defendants' alleged conduct constitutes a pattern of racketeering activity. "To establish the requisite pattern, the plaintiff must allege facts which suggest 'long-term criminal conduct,' not.., short-lived episodes unlikely to be repeated." Wade v. Hopper, 993 F.2d 1246, 1251 (7th Cir. 1993) (quoting Schiffels v. Kemper Fin. Servs., Inc., 978 F.2d 344, 353 (7th Cir. 1992)). In determining whether a pattern exists, the court looks to: (1) the number and variety of predicate acts and the length of time over which they were committed; (2) the number of victims; (3) the presence of separate schemes; and (4) the occurrence of distinct injuries. Id. Duration is the most important aspect of the analysis. Vicom, Inc. v. Harbridge Merchant Servs., Inc., 20 F.3d 771, 781 (7th Cir. 1994). A pattern of racketeering activity "requires the showing of a relationship between the predicates and of the threat of continuing activity." H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239, 109 S. Ct. 2893, 2900 (1989). There must be "a series of related predicates extending over a substantial period of time," meaning a period of time greater than a few weeks or months. Id. at 242, 109 S. Ct. at 2902. Or there must be a showing that there is a threat of continued criminal activity, meaning the racketeering activity constitutes an entity's regular way of conducting business or the activity, by its nature, is likely to extend into the future. Id.

Plaintiff's allegations stem from one incident, the alleged improper determination that plaintiff had an unlawful pocket knife in his possession, in which a few reports were mailed and faxed and a few telephone calls were made regarding the one incident. These actions spanned only a few days. Such an allegation is wholly insufficient to fulfill the duration test for a proper RICO allegation. Vicom, 20 F.3d at 780. There is absolutely no indication that there is any threat of continuing racketeering. The courts also do not look favorably on finding a pattern of racketeering exists where the injury is premised solely on predicate acts of mail or wire fraud and the plaintiff cannot show that a distinct injury was inflicted with each act of mail or wire fraud. Id. at 781-82; Midwest Grinding Co. v. Spitz, 976 F.2d 1016, 1024-25 (7th Cir. 1992); U.S. Textiles, Inc. v. Anheuser-Busch Cos., 911 F.2d 1261, 1268 (7th Cir. 1990). The alleged mailings and telephone calls were related to one episode of alleged wrongdoing which is insufficient to establish a pattern since these alleged predicate acts relate to but a single act. Sutherland v. O'Malley, 882 F.2d 1196, 1205 & n.8 (7th Cir. 1989). Thus, plaintiff has failed to allege a variety of predicate acts. Vicom, 20 F.3d at 781. Moreover, plaintiff is the only alleged victim of the purported single scheme. In sum, plaintiff has only claimed that defendants allegedly executed a single scheme through a few instances of alleged mail and wire fraud that were committed over a short period of time, the scheme came to an end, and inflicted injury on one victim. The limited kind, number, and duration of the predicate acts and the scheme alleged by plaintiff does not establish the kind of continued threat of criminal activity required under RICO. Miller v. Gain Fin., Inc., 995 F.2d 706, 708-09 (7th Cir. 1993); Wade, 993 F.2d at 1251; 420 East Ohio Ltd. Partnership v. Cocose, 980 F.2d 1122, 1125 (7th Cir. 1992); Spitz, 976 F.2d at 1025; Uni*Quality, Inc. v. Infotronx, Inc., 974 F.2d 918, 922 (7th Cir. 1992). Nor has plaintiff alleged a specific, genuine threat of repetition since the alleged discrete goal had a natural ending point. Vicom, 20 F.3d at 782-83; Spitz, 976 F.2d at 1023; Uni*Quality, 974 F.2d at 922. This one, isolated incident related to plaintiffs pocket knife does not constitute a threat of long-term criminal conduct and thus does not rise to the level of a civil RICO claim. Accordingly, plaintiff has failed to state a RICO claim and Count XII must be dismissed.

CONCLUSION

Based on the above stated reasons, defendant United States's motion to dismiss is GRANTED and all defendants except defendant Robert Howard are hereby dismissed from this case. Plaintiffs motion to strike is DENIED. This case is set for report on status and the prove up of the default of defendant Robert Howard at 10:00 a.m. on June 16, 1998. All other pending motions are moot.

ENTER:

s/James F. Holderman

JAMES F. HOLDERMAN
United States District Judge

DATED: May 29, 1998

Minute Order Form (06/97)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	James F. Holderman	**Sitting Judge if Other than Assigned Judge**

CASE NUMBER 97 C 1424 **DATE** 6/29/1998

CASE TITLE Martin Rosenthal vs. USA, et al

[in the following box (a) indicate the party filing the motion. e.g., plaintiff, defendant. 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) Filed motion of [use listing in "Motion" box above.]

(2) Brief in support of motion due _____

(3) Answer brief to motion due_____. Reply to answer due_____.

(4) Ruling/Hearing on _____ set for _____ at _____.

(5) Status hearing[held/continued to] [set for/re-set for] on_____set for_____ at.

(6) Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) Trial[set for/re-set for] on _____ at _____.

(8) [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) This case is dismissed [with/without] prejudice and without costs [by /agreement/pursuant to] FRCP4(m) General Rule 21 FRCP41(a)(1) FRCP41(a)(2).

(10) **X** [Other docket entry] The Court declines to enter an order of default judgment against defendant Howard. This court vacates ands sets aside its order of default of 2/11/98. This case is dismissed in its entirety.

(11) **X** [For further detail see order attached to the original minute order.]

No notices required, advised in open court. **Document Number**

No Notices required

2

X Notices mailed by judge's staff. **number of notices**

Notified counsel by telephone **date docketed**

Docketing to mail notices **docketing deputy initials**

X Mail AO 450 form. **6/27/1998**
date mailed notice

Copy to judge/magistrate judge.

KB

courtroom deputy's initials **mailing deputy initials**
KB s/KB

Date/Time received in central Clerk's Office

On February 11, 1998, this court entered an order of default against defendant Robert Howard. Such order was issued on plaintiff's motion and was an entry of default under Rule 55(a) of the Federal Rules of Civil Procedure. This entry of default under Rule 55(a) was an interlocutory step taken in anticipation of a potential entry of final default judgment under Rule 55(b) of the Federal Rules of Civil Procedure. As a result of the Rule 55(a) entry of default, this court set the case for status on June 16, 1998 to allow plaintiff the opportunity to prove up damages as against defendant Howard and to allow the court to evaluate the validity and merit of plaintiff's claims. On June 16,1998, plaintiff presented his materials in support of his claimed damage. This court, not having entered an order of default judgment under Rule 55(b), declines to do so because plaintiff's allegations are insufficient to support a default judgment. Consequently, this court having reviewed the record hereby vacates its February 11, 1998 order of default against defendant Howard and dismisses plaintiff's claims against defendant Howard in their entirety.

Under Rule 55(a), the clerk of the court is to enter the default of a party when that party has failed to plead or otherwise defend, which applies to defendant Howard. Fed. R. Civ. P. 55(a). This entry is a recognition of the fact that a party is in default for failure to comply with the rules. Entry of default judgment of a party, even where an order of default has been entered, however, is not a matter of right. McDaniel v. Nationwide, 85 B.R. 69, 71 (Bankr. N.D. Ill. 1988). "One of the factors the Court may consider in exercising its discretion [as to whether a default judgment should be entered] is whether entry of the default judgment will result in injustice." Id. Default judgment may only be granted for claims that may be lawfully granted based on well-pleaded facts in the complaint. Hooker v. Pazera, No. 3:92-CV-715RM, 1996 WL 476658, at *3 (N.D. Ind. Aug. 19, 1996). If a complaint fails to state a claim upon which relief may be lawfully granted, then default judgment is not proper and an entry of default may be vacated. Id. (citing several cases such as Thomson v. Wooster, 114 U.S. 104, 113-14 (1885); Wagstaff-EL v. Carlton Press Co., 913 F.2d 56, 57-58 (2d Cir. 1990); Alan Neuman Prods. Inc. v. Albright, 862 F.2d 1388, 1391-93 (9th Cir. 1988);

Nishimatsu Constr. Co. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975)).

This court has now evaluated the merits and validity of plaintiff's claims against defendant Howard. All of the other defendants in this case previously moved to dismiss the counts of plaintiff's Third Amended Verified Complaint in which they were named. This court granted those defendants' motion to dismiss in an opinion and order dated May 29, 1998. Defendant Howard is named in Counts One, Two, Four, Five, Seven, and Thirteen of plaintiff's Third Amended Verified Complaint. This court, having previously provided plaintiff with the opportunity to respond to the sufficiency of his allegations, hereby adopts the reasoning provided in its May 29, 1998 opinion and order in concluding that plaintiff has failed to state a claim upon which relief may be granted as against defendant Howard in Counts One, Two, Five, and Thirteen of plaintiff's Third Amended Verified Complaint. Furthermore, defendant Howard is not a governmental employee or actor further rendering some of plaintiff's claims insufficient. Plaintiff's allegations in such counts are insufficient to support a default judgment. Entry of default judgment on legally insufficient claims is inappropriate and would create injustice. Count Four contains a state law claim of negligent and intentional infliction of emotional distress and Count Seven contains a state law claim of libel against defendant Howard. Since this court has dismissed all the other counts in plaintiff's Third Amended Verified Complaint that established the jurisdiction of this court over plaintiff's case, this court declines to exercise jurisdiction over the remaining state law claims. 28 U.S.C. § 1367. This court adds that it has reviewed plaintiff's submission of his prove-up of damages he contends he suffered. Plaintiff's figure of $125,000,000 is incredulous. While this court does not condone defendant Howard's failure to defend this case, the circumstances of this case make entry of default judgment inappropriate and unjust.

Since this court has determined that plaintiff's Counts One, Two, Five, and Thirteen against defendant Howard are legally insufficient to support an entry of default judgment against defendant Howard and since this court declines to exercise jurisdiction over Counts Four and Seven, this court declines to enter an order of default judgment under Rule 55(b) against defendant Howard. Furthermore, this court hereby vacates and sets aside its order of February 11, 1998. This case is dismissed in its entirety.

Minute Order Form (06/97)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	James F. Holderman	**Sitting Judge if Other than Assigned Judge**	

CASE NUMBER 97 C 1424 **DATE** 1/14/1998

CASE TITLE Martin Rosenthal vs. USA, et al

[in the following box (a) indicate the party filing the motion. e.g., plaintiff, defendant. 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) Filed motion of [use listing in "Motion" box above.]

(2) Brief in support of motion due _____

(3) Answer brief to motion due_____. Reply to answer due_____.

(4) Ruling/Hearing on _____ set for _____ at _____.

(5) Status hearing[held/continued to] [set for/re-set for] on_____set for_____ at.

(6) Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) Trial[set for/re-set for] on _____ at _____.

(8) [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) This case is dismissed [with/without] prejudice and without costs [by /agreement/pursuant to] FRCP4(m) General Rule 21 FRCP41(a)(1) FRCP41(a)(2).

(10) **X** [Other docket entry] Defendant U.S. shall submit affidavits, etc. certifying that individual defendants were acting in their official capacity on or before 2/4/98. Status hearing set for 2/11/98 at 10:00 a.m.

(11) **X** [For further detail see order attached to the original minute order.]

No notices required, advised in open court. **Document Number**

No Notices required

X Notices mailed by judge's staff. **2 number of notices**

Notified counsel by telephone **date docketed**

Docketing to mail notices **docketing deputy initials**

Mail AO 450 form. **1/14/1998 date mailed notice**

Copy to judge/magistrate judge.

courtroom deputy's initials **KB** **KB mailing deputy initials**

Date/Time received in central Clerk's Office

Plaintiff, Martin Rosenthal, has filed a motion for discovery and an evidentiary hearing on the issue of the capacity in which the defendants were acting. On November 25, 1997, pursuant to 28 U.S.C. § 2679(d) the United States certified as to plaintiff's common law tort counts that the individual defendants were acting within the scope of their employment, thereby substituting the United States as the defendant with respect to plaintiff's tort counts. Plaintiff now requests that this court grant leave for discovery pursuant to Rule 26(d) of the Federal Rules of Civil Procedure in order for him to determine whether the defendants indeed acted within the scope of their employment since plaintiff contends that the facts are in dispute on this issue.

This court is permitted to review whether the scope of employment certification was proper. Gutierrez de Martinez v. Lamagno, 115 S. Ct. 2227, 2237 (1995); Hamrick v. Franklin, 931 F.2d 1209, 1211 (7th Cir. 1991). Illinois law governs whether the defendants were acting within the scope of employment. Snodgrass v. Jones, 957 F. 2d 482, 484 (7th Cir. 1992). Plaintiff in this case has not yet contested the scope of employment certification. He only now seeks discovery on this issue. The Fourth Circuit Court of Appeals recently expounded on this very issue in Gutierrez de Martinez v. Drug Enforcement Admin., 111 F.3d 1148 (4th Cir. 1997). In Gutierrez, in one issue before the court, the court reviewed the district court's denial of the plaintiffs' request for additional discovery on the scope of employment certification. The court stated that the Attorney General's certification is conclusive unless challenged. Id. at 1153. See also Ezekiel v. Michel, 66 F.3d 894, 899 (7th Cir. 1995) (stating that the plaintiff bears the burden of demonstrating that the defendant employee was not acting within the scope of employment). The plaintiff must come forward with "specific evidence or the forecast of specific evidence that contradicts the Attorney General's certification decision, not mere conclusory allegations and speculation." Gutierrez, 111 F.3d at 1155. If the plaintiff's evidence is sufficient to meet this burden, then the defendant employee or the Government may come forward with evidence in support of certification. Id. "At this point, the district court may

permit (and limit) any needed discovery." Id. Thereafter, the court must decide whether there are any genuine issues of material fact related to the decision to certify the scope of employment, if so then the court may conduct an evidentiary hearing to resolve the issues. Id. Once the factual issues are resolved, the district court should weigh all the evidence and determine whether certification was proper. Id. "During this process, the district court should remain cognizant of the considerations weighing against protracted litigation under the Westfall Act." IId. The Fourth Circuit Court of Appeals concluded that the district court's denial of the plaintiffs' request for discovery and an evidentiary hearing was not improper. Id. The court stated that the district court properly balanced the need for meaningful review of the certification against the need to protect federal employees from burdensome discovery and concluded that additional discovery would not develop any further facts and the material facts relating to the scope of employment issue were not in dispute. Id. (citing Schrob v. Catterson, 967 F.2d 929, 936 (3d Cir. 1992)). The district court in Gutierrez made this conclusion after having the Government submit affidavits and documentary evidence on the issue of scope of employment. Id. at 1152, 1155-56.

Accordingly, at juncture before this court can determine whether discovery is needed on this issue, this court hereby requests that the United States Government submit any affidavits or declarations or documentary evidence that it believes supports its decision to certify the individual defendants in this case. Such an affidavit or declaration should be directed at all of the factual issues raised in plaintiffs motion for discovery. The affidavit or declaration may be made by the person responsible for concluding that certification was proper in this case and should contain all of the factual reasons for reaching this conclusion. The United States Government is hereby given until February 4, 1998 to submit such material. This case is set for report on status at 10:00 a.m. on February 11, 1998. Plaintiff's motion for discovery and an evidentiary hearing is held in abeyance until this court has a chance to review the additional materials.

APPENDIX C

PHOTOCOPY OF
SWISS ARMY "SUPER TINKER" POCKETKNIFE

BEST AVAILABLE COPY

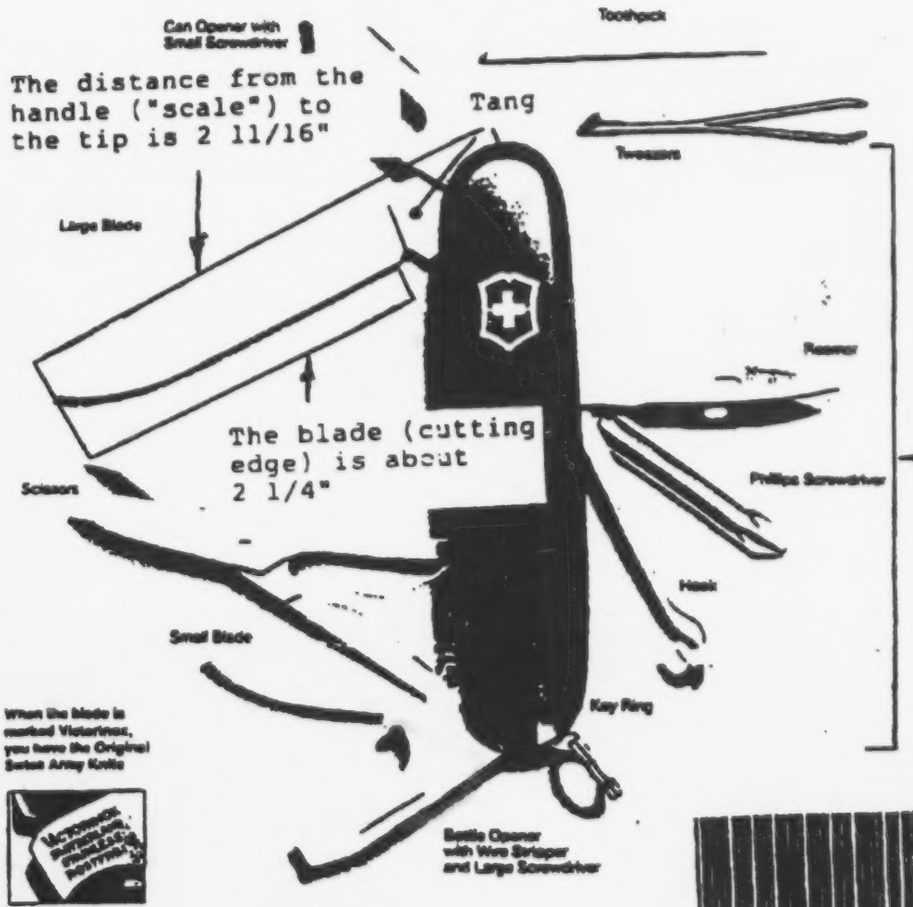
APPENDIX D

DRAWING OF "SUPER TINKER" POCKETKNIFE
ON RADIO SHACK PACKAGE

← Full Lifetime Warranty—See Inside.

THE ORIGINAL SWISS ARMY KNIFE

S U P E R T I N K E R



The length of the handle (the "scale") is 3 1/2 ".

Super Tinker
Model No. 56341/Red
Manufactured by Victorinox
Ibach, Switzerland
Package Printed in U.S.A.

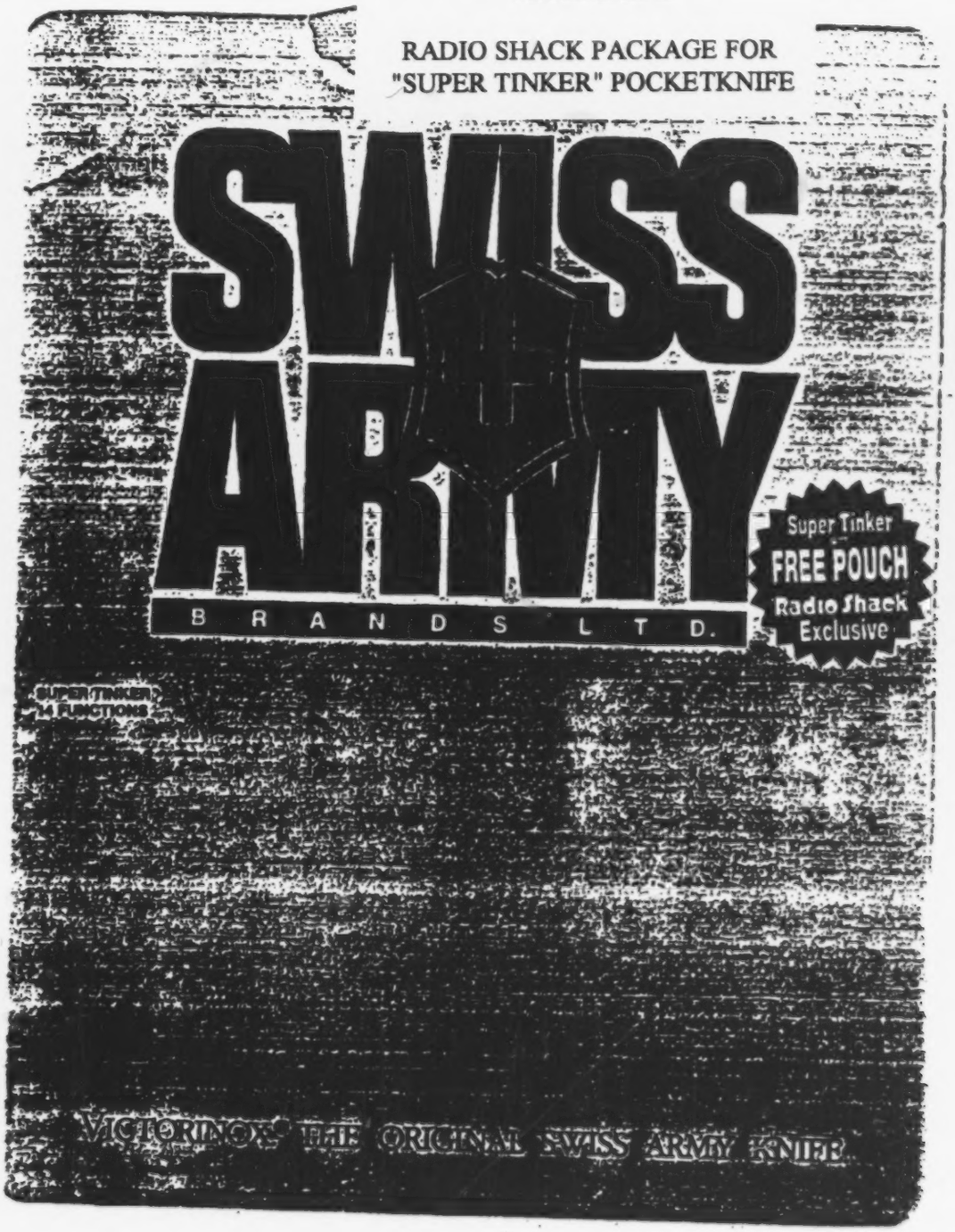
Distributed by
Swiss Army Brands Ltd.
A Subsidiary of
The Forschner Group, Inc.
Shelton, CT 06484

64-2843

Proof of Purchase

APPENDIX E

RADIO SHACK PACKAGE FOR
"SUPER TINKER" POCKETKNIFE



APPENDIX F

RADIO SHACK RECEIPT FOR
"SUPER TINKER" POCKETKNIFE

Radio Shack

A DIVISION OF TANDY CORPORATION

ONE SOUTH WACKER
CHICAGO IL 60606

116298 (312) 332-7683 06/20/94 12:48P

ROSENTHAL

P O BOX 803264

CHICAGO IL 60680

[redacted] X

64-2843 SWIS ARM K W/CASE	1	29.99	29.99

Amr version

victorinox Co

Ibach switzerland

SUBTOTAL	29.99
TAX 8.75%	2.62
TOTAL	32.61
CASH TENDERED	40.00
CHANGE DUE	7.39

CUSTOMER COPY 890983

EXHIBIT G

AFFIDAVIT OF JAMES KENNEDY

AFFIDAVIT

As the former Chairman and Chief Executive Officer of The Forschner Group, Inc., which distributes and markets Victorinox Swiss Army Knives, I hereby attest that the "Super Tinker", manufactured by Victorinox and distributed by The Forschner Group, Inc. has a blade length of 2 3/8 inches. This particular knife in question is not in excess of 2 ½ inches, the parameter in 18 USC 930 G (2) establishing "Lethal Weapons".

The Forschner Group, Inc. is well aware of 18 USC 930 and the blade length for the "Super Tanker" and equivalent models are manufactured with blades below the 2½ inch threshold.

s/James Kennedy
James W. Kennedy

State of Connecticut

ss. April 24, 1996

County of Fairfield

On this the 24th day of April, 1996 before me, the undersigned officer, personally appeared James W. Kennedy, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In witness whereof I hereunto set my hand.

s/Anne R. Callahan
Notary Public

My Commission Expires: 4-30-97

APPENDIX H

LETTER FROM BRYAN SEWELL

RADIO SHACK MERCHANDISING DEPARTMENT
871-390-3244
A Division of Tandy Corporation 1500 ONE TANDY CENTER,
FORT WORTH, TEXAS
76102

March 1, 1996

Martin Rosenthal
P.O. Box 803254
Chicago, IL 60680-3254

Dear Mr. Rosenthal,

Thank you for your letter of February 5,1996, and for taking the time to write to us.

Your letter was forwarded to me by our Customer Service department for a response. In response to your letter the Swiss Army knife is the same model as the Super Tinker marketed by Swiss Army Brands Ltd. I have enclosed a copy of the package for your reference.

Thank you for thinking of Radio Shack for your electronic needs.
Sincerely,

s/Bryan Sewell
Bryan Sewell
Buyer
mtd

Radio Shack ... You've got questions. We've got answers.

APPENDIX I

LETTER FROM DAN BILGER

CORRADO CUTLERY / **OTTO POMPER**
SINCE 1905 Established 1890

26 North Clark Street
Chicago. Illinois 60602
(312)368-8450
Fax (312)368-8451

135 South Wabash Avenue
Chicago, Illinois 60603
(312)372-0881
Fax(312)372-0882

February 27, 1996

Mr. Stephen Ahlgren
105 W. Adams St.
Chicago, IL 60603

Dear Mr. Ahlgren:

I am writing at the request of Mr. Martin Rosenthal regarding the blade lengths on the Victorinox brand of Swiss Army Knives.

I am an authorized dealer of these knives for over 15 years and I can state that to my knowledge there is no knife available in the U.S that has a cutting edge longer than 3 1/16". Additionally, to my knowledge there is no Swiss Army pocket knife that has a blade between 2 7/16" and 3 1/16".

Hoping this information is of use, I remain

Very truly yours,

s/Dan Bilger
Dan Bilger
President

APPENDIX J -

AFFIDAVIT OF CHARLES W. KARWAN

State of Oregon:
County of Douglas, to-wit:

I, Charles W. Karwan, being first duly sworn, upon oath, depose and say the following:

1. That I know of my own personal knowledge that the facts set forth in this affidavit are true.

2. That I am an expert on knives, including pocketknives, and have the qualifications as an expert as listed in Appendix A attached.

3. That to my knowledge and based on research of available reference sources there is no red handled Swiss Army pocketknife manufactured which has a cutting edge longer than three and one-sixteenth inches. In addition, there is no red handled Swiss Army pocketknife manufactured which has a cutting edge of between two and seven-sixteenth inches and three and one-sixteenth inches.

4. That the trade name "Swiss Army knife" refers strictly to the products of the two manufacturers that supply pocketknives to the Swiss Army, the Victorinox and Wenger companies. The specifications set forth in paragraph 3, above, apply to the Swiss Army knives made by both companies as both companies have substantially identical blade specifications for the Swiss Army pocketknives which they manufacture.

5. That the Swiss Army knife pocketknife model known as the "Super Tinker" is manufactured by Victorinox, has a cutting edge of two and five-sixteenth inches, and the distance between the front of the handle and the tip of the master blade of the "Super Tinker" with the blade in the open position is two and eleven-sixteenth Inches.

6. That the term "animate" in reference to the blade of a folding knife does not appear in any folding knife or cutlery references or catalogs that I am aware of even after a thorough search of such literature. However in my expert opinion the "animate" part of a folding knife blade would refer to the entire part of the knife "blade" that moves outside the handle of the knife to include both the cutting edge (the true blade) and the tang (the blunt part between the cutting edge and the handle. Accordingly, the term "animate" would refer to

the entire distance from the blade tip to the handle. In reference to the "Super Tinker", therefore, the "animate" length of the "blade" would be two and eleven-sixteenths inches.

7. That if a folding knife were to have a cutting edge of three and three-quarter inches, it could be expected to have a tang of one quarter to a half-inch and a handle of about five to five and a quarter inches. Thus the entire length of the knife with the blade open would be about nine to nine and a half inches from blade tip to the end of the handle. Such a knife is typically too large to be carried comfortably in a conventional trouser pocket and would not be considered to be a pocketknife but rather a folding belt knife that would be carried in a belt pouch.

8. That, based on normal and customary manufacture a folding hunting knife with a cutting edge of six inches would have a handle of about seven inches in length or more. Thus the overall length of such a knife with its blade in the open position would be about thirteen inches. Such a large knife would be virtually impossible to carry in a conventional trouser pocket without its presence being obvious. Such large folding knives are extremely uncommon because they are not very practical. Indeed my research was only able to find one such knife on the market and it was introduced in just the last few months.

Appendix A

Honor graduate of U. S. Army Ranger School where I was taught how to use knives as weapons.

Graduate of the U. S. Army Special Forces Officer's Course where I received additional training on knife use.

Five years in Special Forces assignments where I received additional training on knife use from some of the top instructors in the country and frequently served as an instructor on knife use myself.

Twenty years writing about cutlery and related subjects In a wide variety of periodicals Including: *GUN WORLD, FIGHTING KNIVES, SOLDIER OF FORTUNE, BLADE,* and others.

Contributing editor and columnist in *TACTICAL KNIVES* magazine since its introduction to the present.

Member of the Oregon Knife Collectors Association ten years.

Paid consultant to the cutlery industry on knife design and engineering nine years.

Expert on knives for Technical Advisory Service for Attorneys twelve years.
Qualified as an expert and testified in court on knives in the case Her Majesty the Queen v. Remington Products In Edmonton, Alberta, Canada.
Part time cutlery dealer twenty two years. Evaluator of knives for cutlery periodicals eleven years.
Graduate of the NW Safari Clipit Course that teaches how to use a knife as a defensive weapon.

End of affidavit.

Dated and signed at Sutherlin, Oregon this 12th day of February, 1997

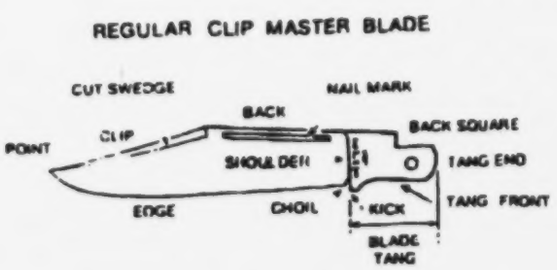
s/Charles W. Karwan
Charles W. Karwan

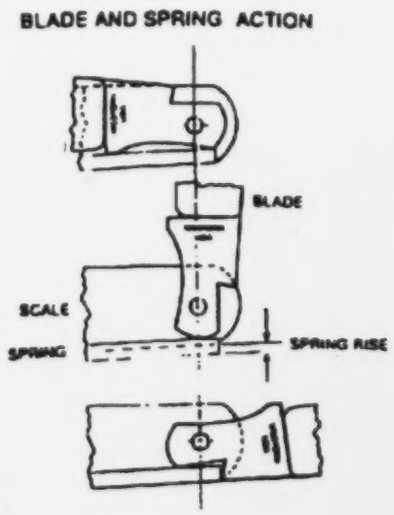
Subscribed and sworn to before me this 12th day of February, 1997

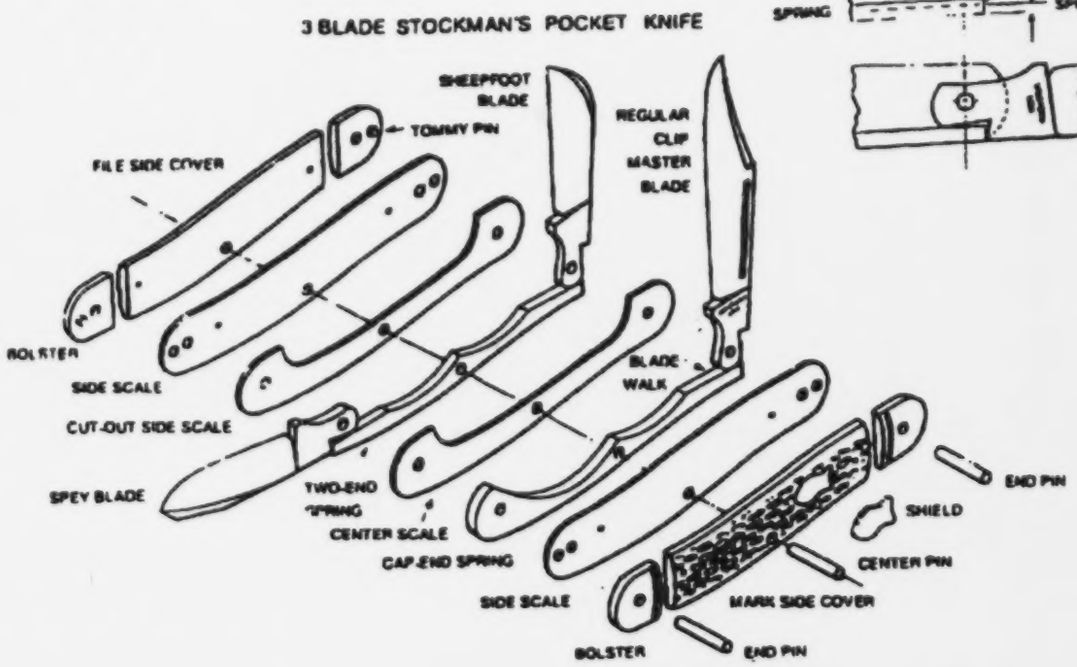
Notary Public s/Pam Thayer
My commission expires on 1-1-98

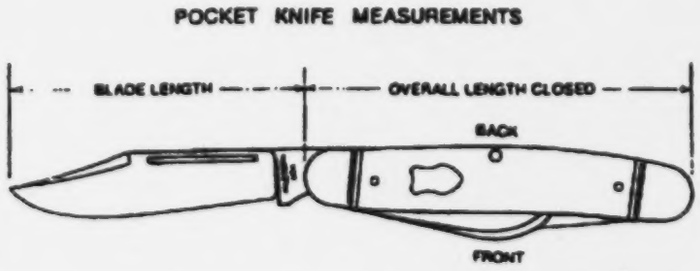
OFFICIAL SEAL
PAM THAYER
NOTARY PUBLIC- OREGON
COMMISSION NO.030267
MY COMMISSION EXPIRES JAN. 01, 1998

BEST AVAILABLE COPY









NOTE On all measurements allow dimensional tolerances for hand work

NOTE All terminology is as used by Western Cutlery Most terms and spellings are traditional in the knife industry and may not be found in dictionaries

19

ives

common
sawbucks
ot shown
ese terms
l, discus-
knife can

Chart II - Pocket and Folding Knives

This drawing, copyright © 1975 by Western Cutlery Co., clearly defines the major terms involved in discussing folding knife features and construction.

APPENDIX K

RECEIPT FOR SWISS ARMY POCKETKNIFE SIGNED BY OFFICER HOWARD

Received or Martin Rosenthal one Swiss Army pocket knife on January 16, 1996.

s/Officer Howard

APPENDIX L

AFFIDAVIT OF DOUGLAS GILMER

State of Illinois
County of Cook, to-wit:

Douglas Gilmer, being first duly sworn, upon oath, deposes and says as follows:

1. That he has been an Attorney-Advisor at the Chicago-South office of the Office of Hearings and Appeals of the Social Security Administration for the past nine years;

2. That he has known another Attorney-Advisor, Martin Rosenthal, for the past nine years, while both have worked at the Chicago-South Office of Hearings and Appeals, and that your affiant's office is next to that of Martin Rosenthal, on the twelfth floor of the Bank of America Building;

3. That he has seen the Swiss Army pocketknife of Martin Rosenthal on numerous occasions and that your affiant knows it is a Swiss Army pocketknife, because your affiant has a Swiss Army pocketknife of the same size, cigar shape, and red color; and that Mr. Rosenthal's Swiss Army pocketknife has always been on Mr. Rosenthal's keychain;

4. That on Tuesday, January 16, 1996, at about 4:50 P.M., Mr. Rosenthal came into your affiant's office while your affiant and your affiant's brother were talking; that Mr. Rosenthal had his Swiss Army pocketknife and said that Ms. Barezky had told Mr. Rosenthal to give his pocketknife to Ms. Barezky; and that your affiant told Mr. Rosenthal to be sure to get a receipt for the pocketknife;

5. That on the afternoon of Thursday, January 18, 1996, following lunch, your affiant and Mr. Gerard Lopatka, another Attorney-Advisor at the Chicago-South office, entered Mr. Rosenthal's office and saw a new, smaller Swiss Army pocketknife which Mr. Rosenthal had just purchased over the lunch hour; Mr. Lopatka and your affiant also saw ties which Mr. Rosenthal had just purchased and that these ties had Swiss Army pocketknives on them;

6. That while Mr. Lopatka and your affiant were in Mr. Rosenthal's office Mr. Lopatka was in good humor and did not say

or do anything which showed any fear; and that Mr. Lopatka laughed and was amused at the sight of the ties, as was your affiant;

7. That Mr. Rosenthal did not display a second, larger fixed blade knife and did not mention such a knife, while your affiant and Mr. Lopatka were in the office of Mr. Rosenthal, as noted in paragraphs 5 and 6, above;

8. That also on January 18, 1996, at the time noted in paragraphs 5 and 6, above, Mr. Rosenthal pointed out to both Mr. Lopatka and your affiant a steak knife with a serrated edge which was in the lunchroom area of the twelfth floor; and that Mr. Rosenthal, Mr. Lopatka, and your affiant discussed the fact that other employees were allowed to possess and use knives on the job; and Mr. Rosenthal photographed the steak knife, with a ruler next to it;

9. That at no time during any of the above events did Mr. Lopatka exhibit any fear in what he said or did and Mr. Lopatka did not seek to leave the presence of Mr. Rosenthal and your affiant;

10. That your affiant has never seen or heard of any improper conduct by Mr. Rosenthal, in regard to the use by Mr. Rosenthal of his pocketknife or in regard to Mr. Rosenthal's conduct toward other employees; that other employees have used Swiss Army pocketknives on the job, including Mr. Dennis Green, a former supervising attorney, who is now an administrative law judge; and that other employees, including Mr. Lopatka, have regularly asked Mr. Rosenthal for advice on the job, both before and after January 16, 1996, and that your affiant has never seen any employees who showed or expressed fear in consulting or dealing with Mr. Rosenthal; and

11. That two employees, David Kaplan and Judy Grant have not spoken to Mr. Rosenthal, since he reported those employees, and two other attorneys, Sherry Grutzius and Janice Bruning, for leaving work early.

Further your affiant sayeth not.

Dated at Chicago, Illinois, this 11th day of November, 1996.

OFFICIAL SEAL
MARTIN E.
ROSENTHAL
Notary Public,
State of Illinois
My Commission
Expires 06/21/2000

s/Douglas L. Gilmer
Subscribed and sworn to before me
this 11th day of November, 1996.

s/Martin E. Rosenthal
Notary Public
My commission expires on June 21, 2000.

APPENDIX M

AFFIDAVIT OF NORMAN MILSK

State of Illinois
County of Cook, to-wit:

Norman Milsk, being first duly sworn, upon oath, deposes and says as follows:

1. That he knows of his own personal knowledge that the facts set forth in this affidavit are true;

2. That he is an Attorney-Advisor at the Chicago-Downtown office of the Office of Hearings and Appeals of the Social Security Administration; and that he is a National Steward of Chapter 224 of the National Treasury Employees Union, in Chicago, Illinois, and that he held this post as steward throughout 1996, during all the events set forth below;

3. That he knows another Attorney-Advisor, Martin Rosenthal, who works at the Chicago-South Office of Hearings and Appeals, located on the twelfth floor of the Bank of America Building; and that he assisted Martin Rosenthal as a union steward in January, 1996, as further set forth below;

4. That on Tuesday, January 16, 1996, at about 4:45 P.M., your affiant received a call from Martin Rosenthal who informed your affiant that the Acting Hearing Office Chief Administrative Law Judge, Bonny Barezky, had ordered Mr. Rosenthal to give his pocketknife to the office guard; and that your affiant attempted to call the vice president of his local union, Ms. Joan Kirshner, whose office is in Seattle, Washington, but was not able to reach Ms. Kirshner;

5. That your affiant called Martin Rosenthal back a few minutes later and learned from Martin Rosenthal that Ms. Barezky was at his office and had ordered him to turn over his pocketknife; that your affiant told Mr. Rosenthal to ask Ms. Barezky by what authority she was asking for his pocketknife; Mr. Rosenthal informed your affiant that Ms. Barezky had shown him the page which is posted by the General Services Administration, in federal offices, concerning dangerous weapons; and that your affiant asked to speak to Ms. Barezky, but that Mr. Rosenthal informed your affiant that Ms. Barezky would not speak to him;

6. That your affiant and Mr. Rosenthal agreed that Mr. Rosenthal should give his pocketknife to Ms. Barezky; and that they also agreed that Mr. Rosenthal should get a receipt for his pocketknife;

7. That on January 30, 1996, at about 1:00 P.M., Mr. Rosenthal came to the office of your affiant and told your affiant he was returning to work after having been on administrative leave during some investigation involving his pocketknife; he said that Ms. Barezky had told him to answer if he had a knife or other dangerous weapon, before he could return to work; Mr. Rosenthal said that he told Ms.

Barezky he wished to have his union steward present, before he was asked any questions; and that your affiant accompanied Mr. Rosenthal to the Chicago-South office, in order to meet with Ms. Barezky;

8. That Mr. Rosenthal and your affiant went to the meeting with Ms. Barezky during the afternoon of January 30, 1996; that prior to the meeting, Mr. Rosenthal and your affiant were escorted from the waiting area of the Chicago-South office, through the office, in the presence of other employees, to Ms. Barezky's private office, by the office security guard, Officer Howard; at the meeting, at which Mr. Rosenthal, Officer Howard, and your affiant were present, Ms. Barezky said she and Officer Howard had observed that Mr. Rosenthal had a knife that exceeded two and a half inches and employees had expressed fear, so that there was a compelling need; Ms. Barezky also said that a four-inch blade knife was taken from Mr. Rosenthal and then given to FPS Chief Officer Bradley; and that Ms. Barezky said that the only authority for asking Mr. Rosenthal if he had a knife or dangerous weapon on his person was that Mr. Rosenthal had been observed with a four-inch blade.

9. That Ms. Barezky refused to tell Mr. Rosenthal and your affiant what would happen to Mr. Rosenthal if he refused to state if he had a knife or other dangerous weapon, but she did say she was taking orders from the Regional Office; that Mr. Rosenthal and your affiant conferred privately; that Mr. Rosenthal and your affiant again spoke with Ms. Barezky, with Officer Howard presents at which time Mr. Rosenthal answered Ms. Barezky's question by stating he did not have a knife or dangerous weapon on his person; Judge Barezky further indicated that special precautions had to be taken and indicated that she did not want another Oklahoma City situation; and that Mr. Rosenthal was then permitted to return to work;

10. That your affiant, on March 27, 1996, wrote a transcription from his notes of the statement of Judge Barezky on January 30, 1996, and that transcription is attached hereto and incorporated herein as Exhibit "A"; and that your affiant wrote a statement on April 15, 1996, under penalty or perjury, concerning the events involved of January 16, 1996, through January 30, 1996, and that statement is attached hereto and incorporated herein as Exhibit "B".

Further your affiant sayeth not.

Dated at Chicago, Illinois, this eleventh day of December, 1996.

"OFFICIAL SEAL"
MARTIN E. ROSENTHAL
Notary Public,
State of Illinois
My Commission Expires
06/21/2000

s/Norman Milsk
Subscribed and sworn to before me this 11th day of December, 1996

s/Martin Elliot Rosenthal
Notary Public
My commission expires on June 21, 2000.

Date: March 27, 1996
To: Kathleen Heiman, NTEU Field Representative
From: Norman Musk, National Steward, NTEU Chapter 224

Re: Transcription of Statement by Chicago South HOCALJ Barezky on January 30, 1996, in the Presence of Martin Rosenthal and Myself

In the course of the investigation regarding your knife it has come to management's attention that a number of employees are concerned about your behavior to the extent that they are fearful for their own safety. Accordingly, a guard is now stationed on the 12th floor. Based upon the fact that Officer Howard and I directly observed you having a knife with a blade over 2 and 1/2 inches on federal property, I am giving you a direct order not to bring any knife of any size into the office. I am also giving you a direct order not to bring any weapon that can do bodily harm into the office. Failure to comply with these direct orders will result in disciplinary action being taken up to and including your removal from federal service. I am reminding you that you are required to treat other employees with courtesy and respect. This is the standard of conduct required of all employees. I will inform you of what action will be taken regarding your conduct and possession of an illegal weapon on January 16, 1996. I am referring you to the Employee Assistance Program if you feel that personal problems are affecting your conduct on duty. This service is confidential and free of charge.

Exhibit "A"

APPENDIX N

TRANSCRIPTS OF CONVERSATIONS BETWEEN BRADLEY AND ROSENTHAL

The following is the telephone conversation between Martin Rosenthal and Agent Cleophas Bradley, Jr., of the Federal Protective Service, on Wednesday, January 17, 1996, at 2:58 P.M..

Bradley: Bradley.
Rosenthal: This is Martin Rosenthal, Agent Bradley. I ...
Bradley: Hey, how you doin', sir?
Rosenthal: O.K. How are you?
Bradley: Can you hold one second?
Rosenthal: Sure.
Bradley: Hello?
Rosenthal: Yes.
Bradley: Mr. Rosenthal.
Rosenthal: Yes.
Bradley: What is happened was that your life ... your knife was found to be, uh, we measured, uh, the full length of the, uh, actual animate part of the blade ...
Rosenthal: Hmm ...
Bradley: It measured two and three-quarters, a little less than two and three-quarters which was found to be illegal by federal standards.
Rosenthal: Hmmm.
Bradley: So, what, what, what's happenin'... no charges are going to be brought against you. O.K.?
Rosenthal: Hmmm.
Bradley: Whatsoever. But I was told to inform you that a knife with less than two and a half inches is legal. Anything else is illegal and you don't need to bring it on federal property. And that was from the U.S. Attorney.
O.K?
Rosenthal: Hmmm.
Bradley: So, your knife will be confiscated and no charges will be filed.
Rosenthal: So, I don't get my knife back.
Bradley: No, sir. You do not. O.K.?

Rosenthal: Yeah. No, it's not O.K.. I think it's pretty bad.
Bradley: O.K., well, sir, uh, that's it, you know. That's what, that's what the U.S. Attorney decided to do and that's it. Your knife was found to be illegal, as far as federal standards and he chose not to pursue any criminal charges ...
Rosenthal: Hmmm.
Bradley: Uh, I didn't think that that would be, you know, in the best interests of you or the federal government. serving you of the office, so I decided that, you know, I didn't really think it was a big issue. He didn't ... he didn't ... He did not want to push the issue.
Rosenthal: Hmmm.
Bradley: But I don't really think ... if you got a knife that's illegal, you don't need to have inside the federal facility. It's as simple as that.
Rosenthal: How many thousands of people do you think are carrying the ...
Bradley: Well, sir, it's not my job to, to determine how many thousands of people are carrying those knives within the property. When it's brought to our attention, we, we act upon it. If we don't know about it, we cannot ... how many people do you think walkin' up and down the street with guns? We don't know.
Rosenthal: I understand. I ...
Bradley: That's all I'm saying. You know, you're tryin' to ... I don't want to play semantics here with you. You were caught. You had the knife. It was found to be illegal. If it wasn't illegal, your knife would have been returned to you and it wouldn't have been any problem. The knife was found to be illegal. It was more than two and one-half inches and that's it. Bottom line.
Rosenthal: O.K.
Bradley: O.K.?
Rosenthal: Thanks.
Bradley: Thank you, sir.

The following is the telephone conversation between Martin Rosenthal and Agent Cleophas Bradley, Jr., of the Federal Protective Service, on Wednesday, January 17, 1996, at 3:06 P.M..

Bradley: Bradley.

Rosenthal: This is Martin Rosenthal, again, Agent Bradley.
Bradley: Yes, sir.
Rosenthal: I just wanted to check something.
Bradley: Hmmm.
Rosenthal: Did you measure it yourself?
Bradley: Yes, I did, sir.
Rosenthal: You did.
Bradley: Yes, sir.
Rosenthal: I went to Radio Shack and measured one and I thought it was two and a half inches.
Bradley: O.K. You thought it was two and a half inches?
Rosenthal: I thought the same kind of a blade was two and a half inches long.
Bradley: O.K. Even if it was, the one that you measured was two and a half inches long and two and a half inches is still illegal, as far as the government is concerned.
Rosenthal: It has to be less than two and a half inches.
Bradley: Right. Less than two and a half inches.
Rosenthal: But this one ... you're saying the actual blade was two and three-quarter inches.
Bradley: It was a little less than two and three quarters. Uh, two and three quarters, a little less than.
Rosenthal: You mean the sharp part of the blade, or the ...
Bradley: It's not ... see that's where you're mistaken. It's the length of the blade.
Rosenthal: The length of the blade.
Bradley: Right.
Rosenthal: ... is a little less than two and three-quarter inches
Bradley: Right. It's the whole length of the blade, not just the sharp part of the blade. It's the entire length of the blade.
Rosenthal: O.K, O.K., thanks, anyway.
Bradley: O.K.
Rosenthal: All right.
Bradley: Thank you.

The following is the telephone conversation between Martin Rosenthal and Agent Cleophas Bradley, Jr., of the Federal Protective Service, on Monday January 22, 1996, at 7:58 A.M..

Rosenthal: Hello.
Bradley: May I speak to Mr. Rosenthal?
Rosenthal: Yes, speaking.
Bradley: Uh, what can I do for you sir? Uh, this is Special Agent Bradley.
Rosenthal: Oh, thanks for calling back. I appreciate it. And I want to say first that I have nothing against you personally. I know you're doing your job as you see it, but the statute on pocket knives ... I don't know if you want to get it out in front of you, or should I just read it? I know you're familiar with it.
Bradley: O.K., look, sir. Let me explain something to you.
Rosenthal: Hmmm.
Bradley: Regardless of whether it's a pocket knife, whether it's a blunt [inaudible] ... O.K? Uh ...
Rosenthal: Let, let me just read the one sentence here. It says a dangerous weapon does not include a pocket knife with a blade of less than two and a half inches ...
Bradley: Your blade is more ...
Rosenthal: You're talking about the longest blade on the knife.
Bradley: It does not matter. Sir
Rosenthal: The statute doesn't talk about the longest blade.
Bradley: Uh, let me explain something to you, sir.
Rosenthal: The statute ...
Bradley: Your knife has been confiscated. The U.S. Attorney has been advised of your case. You're not gettin' the knife back unless it comes from the U.S. Attorney's office, signed, sealed and delivered, sayin' that he has his knife. If that does not come from the U.S. Attorney in the time frame that we are ... we must maintain evidence ...
Rosenthal: How long
Bradley: ... that's it.
Rosenthal: How long do you have to ...
Bradley: O.K., let me explain something else to you. There is no need for you to keep callin' around to my supervisor and to other agents, because, um, this is my case. The case is closed. The knife is not comin' back to you.
Rosenthal: How long do you keep it? How long do you have to keep it?

Bradley: O.K., sir, what you got to understand is I'm not goin' to sit here and discuss ...
Rosenthal: I just want to know how long ...
Bradley: ... policy with you. O.K., and we would really appreciate it unless you are ... you have something legitimate to report, then we appreciate it if you didn't call me every day six or seven times a day. O.K.? We really appreciate it if ... you know we do have other cases and work to do.
Rosenthal: Fine. Do you understand what I'm saying about the statute?
Bradley: Sir, I've been through the statute. I know the statute. I know the knife is illegal and that's it.
Rosenthal: It doesn't say look to the longest blade. It's an ordinary, everyday pocket knife. The statute says if there is a blade ... they know the pocket knife ... congress knew pocket knifes are multi-bladed knives ...
Bradley: Well, congress should have put that in there and they didn't.
Rosenthal: That's right. Because they didn't need to.
Bradley: O.K.
Rosenthal: Why won't you let me finish?
Bradley: Because I'm tryin' to explain to you ... don't you know the U.S. Attorney has been briefed on all of this ... this is a Swiss pocket knife with a blade ... with one blade on there longer than two and one-half inches.
Rosenthal: Sure, but the statute doesn't talk about the longest blade.
Bradley: Yeah, well, it sound like to me that you got a, a suit that you want to file in. That's what it sound like to me.
Rosenthal: I'm not interested in a suit.
Bradley: O.K.
Rosenthal: I just want ...
Bradley: O.K., what is it you got from me?
Rosenthal: What's happening today is I'm being fired because ...
Bradley: O.K., I don't have anything to do which you're being fired.
Rosenthal: Yes, you do. You told them it was a dangerous weapon. Under the statute it's not a dangerous weapon. It's an ordinary, everyday pocket knife that has a blade, meaning one blade ...
Bradley: O.K., what you have to do then, if you do whatever you want to do, this conversation is over and I really appreciate it unless you have something legitimate to report to me, that you did not call

back to my office with anything or with this knife. I'm not gonna talk to you any more. The next place you can call and talk to is GSA legal. You can call my legal office.
Rosenthal: Who is that? Do you know?
Bradley: GSA legal. That's it, O.K.? Thank you. Have a good day.

APPENDIX O

WRITTEN STATEMENTS OF BAREZKY

Part 1: The following is the typed form of handwritten statements of Defendant Barezky, set forth as libel in the Sixth Cause of Action of the Third Amended Verified Complaint; Mr. Rosenthal first learned of these statements on November 4, 1996, shortly after the defendants had turned them over to his union attorney:

On January 24, 1996, Defendant Barezky, faxed the following statements to several members of the staff of the regional office of the Office of Hearings and Appeals of the Social Security Administration, in Chicago, Illinois:

"I feel strongly that Martin Rosenthal's presence is a danger to the safety of the employees in this office. Based on the increase in the intensity and number of aggressive acts and the continued use of knives of varying description every attorney advisor working in close proximity to Mr. Rosenthal has observed highly unusual behaviors and expressed a good deal of fear and concern, (other than Mr. Rosenthal's friend [Name deleted by Defendant Barezky or someone at the regional office of the Office of Hearings and Appeals]."

On February 8, 1996, Defendant Barezky faxed the following statements, allegedly concerning conduct by Mr. Rosenthal, to Defendant McGinley of the regional office of the Office of Hearings and Appeals of the Social Security Administration, in Chicago, Illinois:

"He opened the knife as he stared at me. It was red and the blade was about four inches long. I kept watching the knife fearfully. I began talking about Barone's case which was on my desk in front of me. With the open knife, Mr. Rosenthal began pointing to spots on the draft opinion making little 'holes' in the page as the knife tapped on my desk with each point. I was unable to continue talking and I said 'Well, let me look into this and I'll get back to you.' Mr. Rosenthal stared at me as he closed his knife slowly in front of me. He did a rigid 'about face' and proceed out of my office saying 'Let me know what you decide' with his back to me."

"He began flailing the knife back and forth as he spoke. I again was frightened to death. My heart began to race. I tried to remain calm as Mr. Rosenthal again began poking the knife into Gustafson's opinion in the case, moving the papers slightly each time he poked them ... he stood up and walked to the doorway. As I approached the doorway, he closed the knife in my face. I blinked and opened the door and left."

"I was reaching for my staple remover which was on my desk when all of a sudden, Mr. Rosenthal again removed his knife (red with the approximately 4" blade) from his pocket and opened it. It was the same knife. He grabbed the papers out of my hand and said 'here, I'll open the staples with my knife'."

"Mr. Rosenthal said, 'I will not -- I don't have to and I most certainly will not give my knife to Officer Howard.'"

"I read the paper and it said that Officer Howard received a Swiss Army knife from Martin Rosenthal. I looked at the paper and told Officer Howard it was OK to sign it which he did. Mr. R then gave his knife to Officer Howard and we proceeded to the 5th floor so Officer Howard could get his orders from his supervisor."

"The blade measured 3 3/4" from its tip to the spot where the sharpened blade ended and the thicker metal (unsharpened) was connected to the body of the knife. I asked Officer Howard to look at it too and he agreed that it was about 3 3/4" measuring only the sharp part of the blade."

Part 2: The following is the typed form of the handwritten statements of Defendant Barezky which are set forth in the Plaintiff's Motion For Discovery And An Evidentiary Hearing On Issue Of Capacity of Defendants, at Exhibit "N", p.11; these statements concern allegations about the events of January 18, 1996; Mr. Rosenthal first learned of these statements on November 4, 1996, shortly after the defendants had turned them over to his union attorney:

"At that time, Mr. R put his left hand over his belt, pulling back his sweater and locking his thumb in a belt loop. Ms. Anderson kicked

my foot with her foot as we both saw that Mr. R was wearing yet another swiss army knife on his keychain. This one was considerably smaller than the one I had seen on four prior occasions and had measured. We discussed our shock after Mr. R left."

APPENDIX P

REPORT OF INCIDENT BY HOWARD

February 5, 1996

Report of Incident at OHA
200 W. Adams St. Suite 510 & 1200
Chicago, IL 60606
(312) 886-5530

On January 16, 1996, at about 4:45 PM Acting Hearing Office Chief Administrative Law Judge Bonny Barezky came to my desk to ask me to come with her up to the 12th floor. She said that Martin Rosenthal, an Attorney Advisor in the Office of Hearings and Appeals, had told Judge Barezky that he had a knife on him. She said she told Mr. Rosenthal to give his knife to me but he refused. I went up to the 12th floor with Judge Barezky and we went to Mr. Rosenthal's Office. I asked Mr. Rosenthal if he had a knife and he told me he did. I asked him to give it to me. He said he would not give it to me. Judge Barezky ordered Mr. Rosenthal to give it to me but he would not. He told me he would only give it to me if I signed a paper that he had already typed saying that I received from him one swiss army knife. Judge Barezky looked at the paper and said I could go ahead and sign it. I signed the page. Mr. Rosenthal then gave me the knife. I looked at the knife. It was about 4" long closed. Judge Barezky and I went to her office so that I could wait for my supervisor's call giving me further instructions. While we waited for the call, Judge Barezky took a wooden ruler out of her desk. She asked me to open the blade so that she wouldn't break her thumb nail. I opened the blade and put the knife on the desk. Judge Barezky placed the ruler next to the open blade. The blade measured between 3 1/2" and 3 3/4" on the ruler on her desk. I then closed the knife and put it in my pocket while I waited for the phone call.

Sergeant Floyd called me. He told me that since there were not threatening gestures made by Mr. Rosenthal, there was not reason to keep the knife. He said that if this office had a policy of not having knives on the premises it would be the best course to follow to hold

the knife since I signed for it. It was now about 5:30 PM and I told Mr. Rosenthal that I would give him the knife when he left for the day. He told me he was going to work that night. Judge Barezky told Mr. Rosenthal he could pick it up the next day at the end of the working day. I kept the knife overnight. The next morning, Federal Protection Officer Holderbaum came to this office. I turned the knife over to him.

s/Robert Howard, Jr.
Officer Robert Howard

APPENDIX Q

AFFIDAVIT OF DONNA VAN POLEN

STATE OF ILLINOIS)
)ss.
County of Cook)

Donna M. Van Polen, being first duly sworn, upon oath, deposes and says as follows:

1. That she knows of her own personal knowledge that the facts set forth in this affidavit are true.

2. That she was informed many months ago, by Doug Gilmer, Esq., that people have said some things about Marty Rosenthal which are not true.

3. That she found out last week just how extreme and hideous the things that have been said about Mr. Rosenthal actually are; that she found out that people have stated in writing that they were worried about their safety and felt that their lives were in danger around Mr. Rosenthal, and that one individual wrote that people were at risk of ending up in body bags, as a result of Mr. Rosenthal, and that another individual was scared that her daughter would be harmed by Mr. Rosenthal.

4. That, having worked across the hall from Mr. Rosenthal since September, 1996, all of these accusations about him are clearly the opposite of what I have known Marty to be: an honest, courteous, considerate, kind individual, who is a role model professional; in fact, Judge Barezky told me about a month ago that Mr. Rosenthal is a "role model employee"; your affiant has always found Mr. Rosenthal to be willing to help, especially regarding the work we perform in this office of rendering decisions for claimants who are applying for disability benefits; your affiant's only shock in this matter is that people would reduce to writing, and turn in statements, accusing Mr. Rosenthal of being, or even inferring that he is, a dangerous, potential murderer.

5. That your affiant has actually suffered her own share of emotional distress over this matter, learning that people would accuse someone she has known and worked with for many months, who has always been a very professional, friendly, and helpful person, of being a potential threat to the safety and lives of those around her.

6. That your affiant spoke with Judge Bonny Barezky on May 28, 1997, and your affiant was in tears over the fact that hideous, potentially frightening lies were being told and that Mr. Rosenthal was being made to look like a dangerous, potential murderer; the fact that he is allowed to work in this office, and that your affiant was encouraged by Mr. Gilmer, after he became supervising attorney, to move into an office adjacent to that of Mr.. Rosenthal speaks for itself; whether Mr. Rosenthal is dangerous has never been and is still not an issue for your affiant; Judge Barezky supported my beliefs by stating to me, on May 28, 1997, that Mr. Rosenthal is not dangerous; she also stated to me that any staff attorneys who have written lies about Mr. Rosenthal may very well have to answer for these statements; Judge Barezky further stated that if she felt for one second that Mr. Rosenthal was a danger to be around, there is no way that Judge Barezky would allow me or others to work in the same office with Mr. Rosenthal; Judge Barezky also stressed the sincerity of her belief that Mr. Rosenthal was not a danger to others by informing your affiant that she would lose her position if she allowed someone whom she believed was dangerous to work with us in the office; Judge Barezky also stated to me that, even though Mr. Rosenthal took out his knife in her office, Judge Barezky, as she said, was not the least bit afraid of him and she stated that she never thought that Mr. Rosenthal was dangerous; and that Judge Barezky said that she saw Mr. Rosenthal a couple of times subsequent to this, and although he had a knife, she never felt that he was dangerous.

7. That your affiant is most grateful, although not the least bit surprised, that Judge Barezky has taken a position of integrity and has been supportive of your affiant's complaints about the lies that have been told regarding Mr. Rosenthal's character; that your affiant has always known Judge Barezky to be, as Mr. Rosenthal is, a very professional, honest person who would never wrongfully cast a person in a bad light; that your affiant must give Judge Barezky

credit, because Judge Barezky has been instrumental to your affiant's prayers being answered on more than one occasion; first, by having offered your affiant this position as a staff attorney in an office where your affiant could relocate from New York and be closer to her relatives; and second, by giving your affiant peace of mind as how to cope with the lies being told about Mr. Rosenthal.
Further your affiant sayeth not.

Dated at Chicago, Illinois, this 10th day of June, 1997.

"Official Seal"
Martin E. Rosenthal
Notary Public, State of Illinois
My Commission Expires
06/21/00.

s/Donna M. Van Polen
Donna M. Van Polen, Esq.

Subscribed and sworn to before
this 10th day of June, 1997.

s/Martin E. Rosenthal

Notary Public

My commission expires on
June 21, 2000.

APPENDIX R

AFFIDAVIT OF MARTIN E. ROSENTHAL ON
ADDITIONAL FACTS LEARNED FOLLOWING DISMISSAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARTIN ROSENTHAL,	x	CIVIL ACTION NO.
	x	97 C 1424
Plaintiff,	x	
	x	JUDGE HOLDERMAN
v.	x	
	x	MAGISTRATE JUDGE
UNITED STATES, et al.,	x	ASHMAN
	x	
Defendants.	x	

AFFIDAVIT OF MARTIN E. ROSENTHAL ON
ADDITIONAL FACTS LEARNED FOLLOWING DISMISSAL

STATE OF ILLINOIS)		RECEIVED
	)ss.	AUG 28, 1998
County of Cook	)	MICHAEL W. DOBBINS
		CLERK, U.S. DISTRICT COURT

Martin Rosenthal, being first duly sworn, upon oath, deposes and says as follows:

1. That he is the plaintiff in the above-entitled cause of action and that he knows of his own personal knowledge that the facts set forth in this affidavit are true.

2. That on or about July 15, 1998, an attorney who works with your affiant at the Chicago-South Office of the Office of Hearings

and Appeals of the Social Security Administration, Ms. Donna Van Polen, informed your affiant that she had a conversation on this date with one of the defendants in this case, Gerard Lopatka; and the statements which Mr. Lopatka made to Ms. Van Polen in that meeting were told to your affiant by Ms. Van Polen on or about July 15, 1998, as set forth below.

3. That Ms. Van Polen stated to your affiant that on the above date, on or about July 15, 1998, in the conversation referred to in Paragraph 2, above, Ms. Van Polen asked Mr. Lopatka why he had written his statement about your affiant, in reference to Mr. Lopatka's statement that your affiant was dangerous and had large knives, so that Mr. Lopatka feared for his safety.

4. That, in response to the question from Ms. Van Polen, set forth in Paragraph 3, above, Mr. Lopatka stated that your affiant is a "nice guy" and that Mr. Lopatka did not really think that your affiant was dangerous; however, Ms. Van Polen further stated that Mr. Lopatka said the reason that he had written the statement was that Ms. Bonny Barezky had called him and other attorneys to a meeting and had told them to write statements about your affiant and that Mr. Lopatka also said that Ms. Barezky told the attorneys at the meeting to "use buzz words" in their statements, in reference to your affiant; Mr. Lopatka further said to Ms. Van Polen that when the head of the office requests such a statement, it is necessary to give it; however, Mr. Lopatka told Ms. Van Polen that what your affiant did to Ms. Patricia Kelly, a former Administrative Law Judge at the Chicago-South Office, by allegedly threatening her with knives, was terrible.

5. That your affiant had not learned of the meeting which Ms. Barezky had with the attorneys in the office, which Mr. Lopatka referred to, and did not know anything about any of the events or statements set forth in this affidavit until Ms. Van Polen told them to your affiant on or about July 15, 1998, about two weeks after the above cause of action was dismissed; and that virtually all of Mr. Lopatka's prior statements, regarding your affiant having been a threat to Mr. Lopatka, Ms. Kelly, or anyone else, were and are totally false and fabricated.

Further your affiant sayeth not.

Dated at Chicago, Illinois, this 27th day of August, 1998.

s/Martin Rosenthal

"OFFICIAL SEAL"
Maria G. Leyva
Notary Public,
State of Illinois
My Commission Exp.
12/04/2000

Subscribed and sworn to before me
this 27th day of August, 1998.
s/Maria G. Leyva
Notary Public
My commission expires on 12-04-2000.

APPENDIX S

AFFIDAVIT OF MARTIN ROSENTHAL IN SUPPORT OF MOTION TO DISQUALIFY OFFICE OF U.S. ATTORNEY FROM REPRESENTATION OF DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARTIN ROSENTHAL,	x	CIVIL ACTION NO.
	x	97 C 1424
Plaintiff,	x	JUDGE HOLDERMAN
	x	MAGISTRATE JUDGE
v.	x	ASHMAN
	x	
UNITED STATES, et al.,	x	RECEIVED
	x	FEB 05 1998
Defendants.	x	MICHAEL W. DOBBINS CLERK, U.S. DISTRICT COURT

AFFIDAVIT IN SUPPORT OF MOTION TO DISQUALIFY OFFICE OF U.S. ATTORNEY FROM REPRESENTATION OF DEFENDANTS

STATE OF ILLINOIS)
)ss.
County of Cook)

Martin Rosenthal, being first duly sworn, on oath, deposes and says as follows:

1. That he knows, based on his own personal knowledge, that the facts set forth in this affidavit are true.

2. That on or about January 17, 1996, Defendant Bradley informed your affiant that he had seized your affiant's pocketknife,

because it was illegal and had a blade of "almost two and three-quarters" inches long; and that Defendant Bradley also informed your affiant that Defendant Bradley had spoken to the U.S. Attorney about your affiant's pocketknife and that the U.S. Attorney had decided not to prosecute.

3. That on or about January 23, 1996, your affiant spoke with Defendant Maxse who informed your affiant that the Federal Protective Service had confiscated your affiant's pocketknife, after consultation with the U.S. Attorney, and that the U.S. Attorney would say that the confiscation of your affiant's pocketknife was in accordance with the statute.

4. That on or about January 29, 1996, your affiant spoke with Assistant U.S. Attorney Stuart Fullerton who informed your affiant that he was the one who Defendant Bradley reported to about your affiant's pocketknife; however, Mr. Fullerton refused to say what Defendant Bradley said about the blade length which Defendant Bradley reportedly measured on the pocketknife of your affiant; Mr. Fullerton said that your affiant could sue Mr. Fullerton; and your affiant informed Mr. Fullerton that this was not the wish of your affiant, but that Mr. Fullerton would be a witness in the matter of the seizure of your affiant's pocketknife.

5. That after inquiring of the Office of the U.S. Attorney what the status of the case was, with regard to the pocketknife of your affiant, your affiant received a letter, dated February 7, 1996, from Mr. Gary Shapiro, the Chief of the Criminal Division of the Office of the U.S. Attorney for the Northern District of Illinois; in that letter, attached hereto as Exhibit "A", Mr. Shapiro stated: "... we have taken no position nor rendered any advisory opinion concerning the merits of any disciplinary or performance related matter which has been or may be brought against you by the Social Security Administration."

6. That your affiant needs to call both Mr. Fullerton and Mr. Shapiro as witnesses in this case, in order to learn what reports were given to the Office of the U.S. Attorney, concerning the seizure of the pocketknife of your affiant; in particular, your affiant needs to have Mr. Fullerton testify what blade length Defendant Bradley

reported to Mr. Fullerton; in addition, your affiant needs to have Mr. Shapiro testify what opinion, if any, the Office of the U.S. Attorney gave to the Federal Protective Service, to whom that opinion was given and when, what role, if any, that opinion played in the seizure of your affiant's pocketknife, and why no matter was pending in the Office of the U.S. Attorney, concerning the pocketknife of your affiant, as stated by Mr. Shapiro in Exhibit "A", given the allegation by Defendant Bradley that your affiant's pocketknife was seized as a dangerous weapon.

7. That, given the statements by Defendant Bradley, that Defendant Bradley had informed the U.S. Attorney that your affiant's pocketknife was illegal, and the statements by Defendant Maxse, noted above, that your affiant's pocketknife was seized after consultation with the U.S. Attorney and that the U.S. Attorney would say that the confiscation was in accordance with the statute, the testimony of both Mr. Fullerton and Mr. Shapiro will play a critical role in this case, in order for your affiant to establish that his pocketknife was and is a legal Swiss Army "Super Tinker" pocketknife, with a largest blade, meaning the cutting edge, of two and five sixteenths inches, so that the seizure of this pocketknife was illegal, and that the defendants attempted to cover up this fact.

8. That the conflicts of interest inherent in the Office of the U.S. Attorney representing the defendants, as noted above, have already been contained in the record, because the letter from Mr. Shapiro, noted above, was contained in the original complaint in this case as Exhibit "N", p.l4 and the original complaint and subsequent pleadings by the Plaintiff have noted that Defendant Bradley falsely reported to the U.S. Attorney that the Plaintiff had an illegal pocketknife.

Further your affiant sayeth not.

Dated at Chicago, Illinois, this 3rd day of February, 1998.

OFFICIAL SEAL
LINDA DAVIS JACKSON
NOTARY PUBLIC,
STATE OF ILLINOIS
MY COMMISSION
EXPIRES 9-30-2000

s/Martin Rosenthal
Martin Rosenthal
Subscribed and sworn to before me
this 3 day of February, 1998.
s/Linda Davis Jackson
Notary Public
My Commission expires on 9-30-2000.

DEPARTMENT
OF JUSTICE
[Seal]

U.S. Department of Justice
United States Attorney
Northern District of Illinois

Dirksen Federal Building (312)353-5300

219 South Dearborn, Room 400
Chicago, Illinois 60604

February 7, 1996

Mr. Martin Rosenthal
P.O. Box 803254
Chicago, IL 60680-3254

Dear Mr. Rosenthal:

United States Attorney James B. Burns asked me to respond to your letter of January 31, 1996.

Pleased be advised that no matter is now pending in the United States Attorney's Office involving your possession of a knife on the premises of a federal facility. Further, we have taken no position nor rendered any advisory opinion concerning the merits of any disciplinary or performance related matter which has been or may be brought against you by the Social Security Administration. Our sole function, at least with respect to the federal criminal statutes, is to investigate and/or prosecute criminal violations of federal law. Any concerns you may have with your administrative treatment by the Social Security Administration will have to be dealt with between you and the SSA.

Very truly yours,

s/Gary S. Shapiro
Gary S. Shapiro
Chief, Criminal Division

Exhibit "A"

APPENDIX T

NOTIFICATION OF PERSONNEL ACTION

The following are the relevant portions of narrative text from the Notification Of Personnel Action:

NOTIFICATION OF PERSONNEL ACTION

5-B Nature of Action
SUSPENSION

Name (Last. First, Middle)
ROSENTHAL MARTIN E

FROM: Position Title and Number

ATTORNEY-ADVISER (GENERAL) 67156T

5. Remarks
REASON FOR SUSPENSION: 1. POSSESSION OF A PROHIBITED WEAPON ON FEDERAL PREMISES. 2. INSUBORDINATE CONDUCT.

46. Employing Department or Agency
SOCIAL SECURITY ADMINISTRATION

50. Signature/Authentication and Title of Approving Official
DONNA M. WILLIAMS
s/Donna M.Williams

APPENDIX U

U.S. OFFICE OF SPECIAL COUNSEL
REQUEST FOR INFORMATION OR ASSISTANCE

OFFICE OF SPECIAL COUNSEL
UNITED STATES OF AMERICA
[Seal]

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4305

REQUEST FOR INFORMATION OR ASSISTANCE

July 8, 1996

TO: Mr. Frank McGinley
Office of Hearings and Appeals
Chicago, IL 60690-3880

The Special Counsel, pursuant to the authority contained in 5 U.S.C. Secs. 1212, 1214, 1216 and 1303 and in Civil Service Rule 5.4 (5 C.F.R. § 5.4), requests that you furnish information or assistance as follows:

I plan to conduct an investigation at the OHA, Chicago, July 15-18, 1996, concerning a proposed adverse personnel action taken against Mr. Martin Rosenthal. Please obtain the listed documents for my review. Please arrange for interviews of the listed individuals on July 15, 16 and 17, 1996 and if necessary the morning of July 18, 1996. Other individuals may be identified for interview, during the investigation. One hour should be sufficient for each witness and 2 hours for the subject. Please schedule Ms. Barezky for the afternoon of July 17, 1996. Please provide a private room, with an electrical outlet, in which to conduct the interviews. All individuals should be apprised of their status and that they may have legal representation.

Documents: Official Personnel Folder of Rosenthal
7B folder of Rosenthal

adverse action file (i.e., documents supporting proposed suspension)
copy of Article 2, Section 4 of union contract

witnesses: Frank McGinley Stephen Ahlgren Norm Milsk
Pamela Goodemote Gustav Anderson James Lanter
Melanie Woodill Doug Gilmer Jerry Lopatka
Dave Kaplan Martha Johnson Patricia Carey
Russell Barone Officer Bradley (FPS)
Officer Robert Howard (FPS) Officer Rudy Negrete (FPS)

subject: Bonny Barezky

The pertinent provisions of the statutes and of Civil Service Rule 5.4 under which this request is made are set forth on page 2 of this form. The request is made for law enforcement purposes and in connection with an official investigation being conducted by the Office of Special Counsel.

Requested by: s/Dale Paris
Signature

Investigation Division
Office

Form OSC - 490A
Rev. 02/93

APPENDIX V

DECLARATION OF THOMAS P. WALSH

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARTIN ROSENTHAL, Plaintiff,	)	
v.	)	No. 97 C 1424
	)	Judge Holderman
UNITED STATES, et al., Defendants.	)	

DECLARATION OF THOMAS P. WALSH
IN SUPPORT OF SCOPE-OF-EMPLOYMENT CERTIFICATION

Thomas P. Walsh declares, pursuant to 28 U.S.C. S 1746:

1. I am an Assistant United States Attorney and Chief of the Civil Division. Authority to make scope-of-employment certifications pursuant to 28 U.S.C. § 2679 has been delegated by the Attorney General under 28 C.F.R. § 15.3 to the United States Attorney for the Northern District of Illinois, and by the United States Attorney to me.

2. On November 25, 1997, I certified that having read the Third Amended Complaint in this action, and based upon the information then available with respect to the incidents referred to in support of counts four, five, six, eight, nine, ten, eleven and twelve therein, individual defendants Stephen Ahlgren, Bonny Barezky, Frank McGinley, Patricia Carey, Gustav Anderson, Raymond McKay, Pamela Goodemote, Gerald Lopatka, David Kaplan, Judy Grant, Paul Maxse, Daniel Kvachkoff, Rudy Negrete, Cleophas Bradley and Eric Holderbaum were acting within the scope of their employment as employees of the United States at the time of the incidents out of which the claims arose.

3. The decision to provide the certification was premised chiefly on the allegations in the Third Amended Complaint itself. The plaintiff is alleging facts in support of his common law tort counts against federal employees (counts four, five, six, eight, nine, ten, eleven and twelve) to the effect that certain employees of the Social Security Administration (SSA) (1) made statements to co-workers, supervisors, subordinates and/or Federal Protective Service (FPS) personnel regarding bizarre, threatening and/or potentially unlawful behavior exhibited by plaintiff, including but not limited to statements regarding plaintiff's Swiss Army Knife, and/or (2) played some role in reporting, investigating and/or taking action in response to allegations against the plaintiff that led to workplace discipline and counseling being imposed upon him. Plaintiff further alleges that employees of the FPS and the GSA (under whose auspices the FPS operates) played roles in taking away plaintiff's knife, making certain determinations as to whether the knife was a dangerous weapon whose possession in a federal building is unlawful, escorting plaintiff from the federal building where he works, and responding to plaintiff's (and other defendants') inquiries and grievances regarding those activities.

4. It appears to me that all of these allegations reflect activities undertaken by the defendants (assuming the allegations are true) in the scope of their employment. All of the alleged actions appear to have occurred in the workplace during working hours, and all are of the type that employees are reasonably expected to engage in.

5. FPS personnel (and by extension defendant Maxse, who is the Regional Counsel for GSA) have broad responsibilities regarding the safety of federal facilities and their occupants, and these responsibilities surely encompass responding to occupants' concerns regarding a potentially unlawful weapon and potentially threatening behavior. I understand that plaintiff alleges that his knife was in fact not an unlawful weapon, and that he did not engage in inappropriate or threatening behavior; this does not alter my conclusion that his allegations all relate to the sort of activities that fall within the FPS' jurisdiction, and therefore that the allegations concern actions undertaken within the scope of employment.

6. Plaintiff's allegations with regard to SSA personnel lead me to the same conclusion. All of those allegations involve reporting or acting on reports of bizarre, threatening and potentially unlawful behavior of a fellow employee, including the display of a knife whose possession in a federal building may be unlawful. Again, I realize that plaintiff claims that the knife was not unlawful, that his behavior was not suspect, and that the disciplinary actions taken against him were in some sense wrongful; but again, this does not alter my conclusion that they are the types of activities that federal employees may reasonably be expected to engage in the furtherance of their employment duties, and that they therefore are actions taken within the scope of employment.

7. FTCA scope determinations are made with reference to state law (here the law of Illinois), and Illinois scope-of-employment law provides that even wrongful behavior may be within the scope of employment. See Wilson v. City of Chicago, 120 F.3d 681, 685 (7th Cir. 1997) (police officer who tortured suspects to extract confessions acted within scope of employment); Argentino v. Village of Melrose Park, 838 F.2d 1483, 1494-95 (7th Cir. 1988) (post-arrest beating within scope of officer's employment); Bryant v. Livigni, 619 N.E.2d 550, 559-560 (Ill. App. 1993) (intoxicated, off-duty grocery store manager who yelled racial epithets at woman and children and physically attacked four-year-old child in store parking lot acted within scope of employment). See also RMI Titanium Co. v. Westinghouse Elec. Co., 78 F.3d 1125, 1143 (6th Cir. 1996) (where plaintiff's complaint "pleads conduct within an individual's scope of employment and merely alleges bad or personal motive, summary dismissal of the scope challenge is warranted").

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 29, 1998.

s/Thomas Walsh
THOMAS P. WALSH

APPENDIX W

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

UNITED STATES CONSTITUTION

1. The Fourth Amendment of the United States Constitution is as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fifth Amendment of the United States Constitution provides, in relevant part, that:

No person ... shall be deprived of life, liberty, or property, without due process of law.

FEDERAL STATUTES

1. 18 U.S.C. § 930, Possession of firearms and dangerous weapons in Federal facilities, provides, in relevant part, that:

(a) Except as provided in subsection (d), whoever knowingly possesses or causes to be present a firearm or other dangerous weapon in a Federal facility (other than a Federal court facility), or attempts to do so, shall be fined under this title or imprisoned not more than 1 year, or both.

(g) As used in this section:

(2) The term "dangerous weapon" means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocketknife with a blade of less 2½ inches in length.

Rule 3.7 Lawyer As Witness

(b) If a lawyer knows or reasonably should know that the lawyer may be called as a witness other than on behalf of the client, the lawyer may act as an advocate in a trial or evidentiary proceeding unless the lawyer knows or reasonably should know that the lawyer's testimony is or may he prejudicial to the client.

Comment

Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.